(13)

No. 94-1175-CFX
Status: DECIDED

Title: Bank One Chicago, N.A., Petitioner
v.
Midwest Bank & Trust Company

Docketed:
December 19, 1994

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Blumenthal,Jeffrey S., Long Jr.,Robert A.

Counsel for respondent: Epsteen,Robert

NOTE: See mail label re dkt dt 010495 labels affixed corr capt. & counsel states capt. corr as above

Entry	Date	Note	Proceedings and Orders
1	Dec 19 1994	G	Petition for writ of certiorari filed.
3	Jan 18 1995		Order extending time to file response to petition until March 3, 1995.
4	Mar 3 1995		Brief of respondent Midwest Bank & Trust Company in opposition filed.
5	Mar 8 1995		DISTRIBUTED. March 24, 1995 (Page 1)
6	Mar 13 1995	X	Reply brief of petitioner filed.
8	Mar 27 1995	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
9	Jun 7 1995		REDISTRIBUTED. June 23, 1995 (Page 1)
10	Jun 7 1995	X	Brief amicus curiae of United States filed.
11	Jun 14 1995	X	Supplemental brief of petitioner filed.
12	Jun 26 1995		Petition GRANTED.
			**********
14	Jul 18 1995		Order extending time to file brief of petitioner on the merits until August 31, 1995.
15	Aug 28 1995		Record filed.
		*	Original record proceedings U.S. Court of Appeals/Seventh Circuit and U.S.District Court/Northern Dist. Illinois
16	Aug 31 1995		Joint appendix filed.
17	Aug 31 1995		Brief of petitioner Bank One, Chicago, N.A. filed.
18	Aug 31 1995	G	Motion of Electronic Check Clearing House Organization for leave to file a brief as amicus curiae filed.
19	Aug 31 1995		Brief amicus curiae of United States filed.
20	Aug 31 1995	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
21	Aug 31 1995	G	Motion of New York Clearing House Association for leave to file a brief as amicus curiae filed.
22	Sep 13 1995		Motion of Electronic Check Clearing House Organization for leave to file a brief as amicus curiae GRANTED.
23	Sep 13 1995		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
24	Sep 28 1995		CIRCULATED.
26	Sep 29 1995		Order extending time to file brief of respondent on the

3 pp

No. 94-1175-CFX

Entry	Date	Note	Proceedings and Orders
			merits until October 20, 1995.
27	Oct 3 1995		SET FOR ARGUMENT TUESDAY, NOVEMBER 28, 1995. (1ST CASE).
28	Oct 10 1995		Motion of New York Clearing House Association for leave to file a brief as amicus curiae GRANTED.
29	Oct 20 1995	X	Brief of respondent Midwest Bank & Trust Company filed.
30	Nov 6 1995	X	Reply brief of petitioner filed.
31	Nov 28 1995		ARGUED.
32	Jan 17 1996		Adjudged to be REVERSED and REMANDED Ginsburg, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Stevens, O'Connor, Kennedy, Souter, Thomas, and Breyer, JJ., joined, and in which Scalia, J., joined in part. Stevens, J., filed a concurring opinion, in which Breyer, J., joined. Scalia, J., filed an opinion concurring in part and concurring in the judgment.

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BANK ONE, CHICAGO, N.A.

Petitioner,

v.

MIDWEST BANK & TRUST COMPANY, an Illinois Banking Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, despite the express grant of jurisdiction to the United States district courts in the Expedited Funds Availability Act, the 7th Circuit erred in determining that banks cannot pursue the cause of action created by the Federal Reserve Board pursuant to the Congressional delegation of authority contained in the Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FIRST ILLINOIS BANK & TRUST,
an Illinois Banking Corporation,

Petitioner,

v.

MIDWEST BANK & TRUST COMPANY,
an Illinois Banking Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, First Illinois Bank and Trust,[1] respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on July 11, 1994.

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[1] When originally filing this action, plaintiff, an Illinois Banking Corporation, was known as First Illinois Bank & Trust. Its name was subsequently changed to First Illinois Bank and it is now known as Bank One Chicago, N.A. It is wholly owned by Banc One Illinois Corporation, an Illinois Corporation, which is wholly owned by Banc One Ohio, an Ohio corporation.

OPINIONS BELOW

The district court issued two (2) memorandum opinions: (1) on August 31, 1993, granting First Illinois' (Petitioner's) Motion for Summary Judgment and denying Midwest Bank's (Respondent's) Cross Motion for Summary Judgment; and (2) on November 25, 1992, denying Midwest Bank's Motion to Dismiss. The opinions are reproduced, respectively, at pages App. 5-14, and App. 17-22. They are not reported.

The opinion of the Seventh Circuit Court of Appeals is reported at 30 F.3d 64 (7th Cir. 1994) and it is printed in the Appendix as pages App. 1-3. In response to the Petition for Rehearing filed by Petitioner, on September 20, 1994, the Seventh Circuit entered its order amending its original opinion. This order is not reported, but it is reproduced at pages App. 24-25.

JURISDICTION

On July 11, 1994, the Seventh Circuit Court of Appeals entered its order vacating the summary judgment entered by the district court in favor of Petitioner, First Illinois Bank. After Petitioner filed a timely Petition for Rehearing, on September 20, 1994, the court entered its order denying the Petition for Rehearing.[2] Jurisdiction of the Supreme Court is invoked under Title 28 U.S.C. 1254(1).

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[2] The court made minor corrections to its original decision, but the gravamen of the decision remained the same.

STATUTES AND REGULATIONS

STATUTES

Title 12 U.S.C. Sec. 4010:

Civil Liability

Sec. 611(a) CIVIL LIABILITY. - Except as otherwise provided in this section, any depository institution which fails to comply with any requirement imposed under this title or any regulation prescribed under this title with respect to any person other than another depository institution is liable to such person in an amount equal to the sum of . . .

. . .

(d) JURISDICTION - Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year after the date of the occurrence of the violation involved.

. . .

. . .

(f) AUTHORITY TO ESTABLISH RULES REGARDING LOSSES AND LIABILITY AMONG DEPOSITORY INSTITUTIONS. - The Board is authorized to impose on or allocate among depository institutions the risks of loss and liability in connection with any aspect of the payment system, including the receipt, payment, collection, or clearing of checks, and any related function of the payment system with respect to checks. Liability under this subsection shall not exceed the amount of the check giving rise to the loss or liability, and, where there is bad faith, other damages, if any, suffered as a proximate consequence of any act or omission giving rise to the loss or liability.

Title 28 U.S.C. Sec 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

REGULATIONS

Regulation CC 12 CFR Part 229:

Section 229.38 Liability

(a) Standard of care; liability; measure of damages. A bank shall exercise ordinary care and act in good faith in complying with the requirements of this subpart. A bank that fails to exercise ordinary care or act in good faith under this subpart may be liable to the depositary bank, the depositary bank's customer, the owner of a check, or another party to the check. The measure of damages for failure to exercise ordinary care is the amount of the loss incurred, up to the amount of the check, reduced by the amount of the loss that party would have incurred even if the bank had exercised ordinary care. A bank that fails to act in good faith under this subpart may be liable for other damages, if any, suffered by the party as a proximate consequence. Subject to a bank's duty to exercise ordinary care or act in good faith in choosing the means of return or notice of nonpayment, the bank is not liable for the insolvency, neglect, misconduct, mistake, or default of another bank or person, or for loss or destruction of a check or notice of nonpayment in transit or in the possession of others. This section does not affect a paying bank's liability to its customer under the U.C.C. or other law.

(b) Paying bank's failure to make timely return. If a paying bank fails both to comply with § 229.30(a) and to comply with the deadline for return under the U.C.C. Regulation J(12 CFR Part 210), or § 229.30(c) in connection with a single non-payment of a check, the paying bank shall be liable under either § 229.30(a) or such other provision, but not both.

(c) Comparative negligence. If a person, including a bank, fails to exercise ordinary care or act in good faith under this subpart in indorsing a check (§ 229.35), accepting a returned check or notice of nonpayment (§§ 229.32(a) and 229.33(c)), or otherwise, the damages

incurred by that person under § 229.38(a) shall be diminished in proportion to the amount of negligence or bad faith attributable to that person.

. . .

. . .

. . .

(g) Jurisdiction. Any action under this subpart may be brought in any United States district court, or in any other court of competent jurisdiction, and shall be brought within one year after the date of the occurrence of the violation involved.

STATEMENT OF THE CASE

In the course of its daily check clearing operations, Midwest Bank negligently failed to advise Petitioner, First Illinois Bank, that it was returning a check because it was "NSF." As a result, Petitioner lost over $40,000.00. Midwest's action violated the duties imposed by the Federal Reserve Board in Regulation CC, 12 CFR Part 229; specifically, its duty to use ordinary care in timely advising a depository bank of the reasons for returning a check unpaid. 12 CFR Sections 229.30 and 229.33(b)(8).

In accordance with the jurisdictional grant of authority expressed by Congress in the Expedited Funds Availability Act (the "EFAA"), Title 12 U.S.C. 4010(d), Petitioner filed suit in the district court to obtain the remedy contemplated by Congress and the Federal Reserve Board. *See*, 12 CFR Secs. 229.38(a) & (g). Because its right to relief was clear, the district court granted First Illinois' motion for summary judgment. Midwest appealed.

During oral argument, *sua sponte*, the reviewing court questioned the district court's original subject matter juris-

diction.[3] On July 11, 1994, the Court of Appeals for the Seventh Circuit ruled that, contrary to the plain language expressed by Congress in the EFAA and the specific regulations promulgated by the Board of Governors of the Federal Reserve System, the district court had no original jurisdiction to hear this cause. Accordingly, the court ordered that the case be remanded to the district court with instructions that it be dismissed for want of subject matter jurisdiction. Plaintiff filed its request for rehearing which was denied.

ARGUMENT

Introduction

The Seventh Circuit's erroneous decision has national consequences; it affects every member bank of the Federal Reserve System as demonstrated by the recent dismissal of a case involving a loss exceeding $3.7 million.[4] Recognizing the significance of the decision, the United States, through the Department of Justice, on behalf of the Board of Governors of the Federal Reserve System, as well as the New York Clearing House Association[5] and Standard Bank and

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[3] Because of the clear language in both the EFAA and Regulation CC regarding federal jurisdiction, this issue had never before been raised in the proceeding.

[4] *NBD Bank v. Standard Bank and Trust Company*, No. 93 C 7224 (N.D. Ill). Based on the Seventh Circuit's decision, *NBD* has been dismissed by the district court and an appeal is pending.

[5] An association of 11 leading commercial banks in New York City. Its members are: The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, European American Bank and Republic National Bank of New York.

Trust Company[6] voluntarily filed their briefs as *Amicus Curiae* supporting Petitioner's request for a rehearing and urging the Seventh Circuit to reconsider its erroneous decision.

Ignoring the plain language of both the EFAA and Regulation CC, the Seventh Circuit Court of Appeals has crossed the line separating its duty to protect the federal courts from the proliferation of civil litigation and its statutory mandate to serve as an arbiter of disputes arising under federal laws and regulations. In a case of first impression, the two (2) page opinion it issued "resolving" this case will wreak havoc with the intricate check return system essential to the routine daily operations of the nation's banks, and in the process will defeat an essential purpose of the EFAA. Title 12 U.S.C. 4001 *et seq*.

The Seventh Circuit's opinion nullifies regulations promulgated by the Federal Reserve Board in accordance with the statutory authority delegated by Congress, finding that, contrary to the express language of 12 U.S.C. 4010(d), there exists no Federal subject matter jurisdiction to resolve interbank disputes arising under Regulation CC, 12 CFR Part 229.

Not only Petitioner, but **every member institution of the Federal Reserve System** (a vast majority of banks in the United States) will be affected by the Seventh Circuit's decision. As stated by the Board:

> if uncorrected, [the Seventh Circuit's decision] would disrupt the system of interbank liability crafted in response to the EFA Act and replace it with, at best, a hodge-podge of inefficient procedures and, at worst, no remedy at all. The administrative forum hypothesized by the panel [the Seventh Circuit] does not exist within

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[6] See note 4, *supra*.

> any of the financial institution regulatory agencies responsible for enforcing the EFA Act . . . . Accordingly, the [Seventh Circuit's] decision leaves payment system participants without a forum for vindication of their EFA Act causes of action, and casts doubt upon the availability of any single forum for the resolution of check payment system disputes.

Brief For Board of Governors of the Federal Reserve System as Amicus Curiae in support of Plaintiff-Appellee's Petition for Rehearing, p. 3.[7]

In its curt opinion, the Seventh Circuit's sole justification for its decision rests on its misconstruction of the plain Congressional language, a construction which conflicts with the Federal Reserve Board's interpretation of the Act. In place of the void it creates by eliminating the judicial remedy Congress provided in the EFAA, the court directs banks to bring their disputes to the Federal Reserve Board. However, as argued by the Board as well as all of the other parties, the administrative remedy envisioned by the court does not exist and cannot constitutionally exist given the absence of any statutory authority allowing the Board to create the administrative tribunal the Seventh Circuit envisions. Failure to reverse the Seventh Circuit's erroneous decision will subvert the purposes of the EFAA by prohibiting all banks from pursuing the remedy Congress provided them in order to protect themselves when following the funds availability guidelines mandated.

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[7] Petitioner will cite the *Amicus* brief submitted to the Seventh Circuit by the Federal Reserve Board as the "FRB Brief," the brief submitted by the New York Clearing House Association as the "NYCH Brief" and the brief of Standard Bank and Trust Company as the "SBT Brief."

I.

The Seventh Circuit's decision deprives banks of the remedy specifically granted by Congress and will therefore subvert the purposes of the Expedited Funds Availability Act.

Congress passed the EFAA motivated by concerns that banks were unduly delaying the availability of funds to their customers by placing "holds" on checks deposited by the customers. These holds were necessary to protect banks against the risks of nonpayment inherent if the funds were withdrawn prior to the check's return. *See*, Preamble to Regulation CC, 53 Fed. Reg. 19372 (May 27, 1988). Congress enacted the EFAA to ensure prompt availability of funds to depositors, but in doing so, recognized the need to establish a uniform, inter-bank system of expeditious return to ameliorate the risks to banks resulting from unpaid checks. FRB Brief, pp. 4-5. It is senseless to imagine that Congress would have left enforcement of the causes of action created by the Federal Reserve Board, to at best, each state to decide according to its whim.

The complementary Congressional goals—speeding funds availability while protecting banks against non-payment risks—are reflected in the structure of the EFAA. Thus, Congress specifically legislated funds availability issues, but deferred to the Board's expertise by delegating to it broad rule-making authority in the areas not addressed by Congress; check collections and return systems. 12 U.S.C. 4008. Congress' desire to make uniform and even supplant existing state laws regarding check collection is evident, because the EFAA provides that the Board's regulations regarding check collection supersede inconsistent state laws, and particularly the Uniform Commercial Code. 12 U.S.C. Sec. 4007(b).

The "Civil Liability" section of the EFAA reflects the complementary roles envisioned by Congress. Thus, in subsec-

tions 4010(a) and (b), Congress specifically legislated the damages recoverable by consumers, persons or classes "other than another depository institution." 12 U.S.C. 4010(a) and (b). In contrast, in subsection (f), Congress delegates to the Board authority to promulgate rules providing for civil liability among banks for disputes arising out of "any aspect of the payment system." 12 U.S.C. 4010(f). It was for violation of those rules (12 CFR Reg 229.30 and 229.33(b)(8)) that Petitioner originally brought its action against Midwest Bank in the district court.

It is apparent from the plain language of sub-section 4010(d), as well as the placement by Congress of both sub-sections (a) and (f) in Section 4010 that Congress intended for the district courts to have jurisdiction over disputes arising under both subsections—that is in disputes between consumers and banks **as well as inter-bank disputes**. Both sub-sections were purposefully placed in Section 4010, entitled "Civil Liability," leaving no doubt that sub-section (d) applies to causes of action arising under both sub-sections (a) and (f). Thus, sub-section (d) provides: "[a]ny action **under this section** [Section 4010, Civil Liability] may be brought in any United States district court . . . ." 12 U.S.C. Sec. 4010(d) (emphasis added).

Citing *K-Mart Corp. v. Cartier, Inc.*, 467 U.S. 837 (1988), the Board argued to the Seventh Circuit that its (the Board's) interpretation of the EFAA—that sub-section 4010(d) provided a federal jurisdictional basis for actions under 4010(a) **and 4010(f)**—is entitled to judicial deference. The Board's interpretation of the EFAA is apparent from Regulation CC itself, wherein the Board parrots the Congressional language, specifically providing for district court jurisdiction to resolve disputes arising under the Regulation. 12 CFR Sec. 229.38(g).

In more detail than is necessary here, the Board thoroughly analyzed Section 4010 to reach its conclusion that

sub-section 4010(d) plainly confers federal jurisdiction to resolve inter-bank disputes arising under sub-section 4010(f). FRB Brief, pp. 11-13. However, the Board went even further.

Citing this Court's recent opinion in *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corp.*, 489 U.S. 561 (1989), the Government also argued that the Seventh Circuit's construction of the EFAA is inconsistent with the "statutory language, structure and purpose" of the Act. FRB Brief, pp. 14-19. The Board concludes that its failure to establish an administrative procedure to resolve inter-bank disputes is not only consistent with the EFAA, but that the EFAA does not even authorize it to hear and resolve such disputes. In short, the Board recognizes that under the EFAA, as enacted by Congress, contrary to the unjustified interpretation adopted by the Seventh Circuit, the only uniform method to provide civil liability in inter-bank disputes is to construe sub-section 4010(d) as providing Federal subject matter jurisdiction.

Standard Bank and Trust carries the argument even further, maintaining that the EFAA did not delegate to the Federal Reserve Board adjudicatory power over private disputes, for several reasons: (a) the plain language of the Act does not make such a delegation; (b) such a delegation would exceed the Board's enumerated powers under the Federal Reserve Act; (c) the Board itself recognizes no such delegation; and (d) such a delegation would be an unconstitutional interpretation of the EFAA. SBT Brief, pp. 3-12.

Contrary to the reasoned and thorough analysis provided by the parties seeking rehearing, the Seventh Circuit's opinion is striking in its brevity. Without citation to any contrary authority and absent any reasoned analysis, the Seventh Circuit rejects the arguments presented. Instead, it relies only on its mistaken interpretation of the EFAA

which is unsupported by the plain language utilized by Congress and is in conflict with the Board's interpretation.

It is necessary for the Court to resolve this issue to carry out the purposes of the EFAA. Absent this Court's intervention,

> [b]anks, which have already seen their check fraud losses soar as a result of the EFAA, will now experience even greater losses if they are deprived of remedies for violations of [sic - the] EFAA and Regulation CC. The confusion and uncertainty as to the proper method for dispute resolution will in itself create significant damage. Indeed, such a result would deter banks from fulfilling the very purpose of [sic - the] EFAA—expediting funds availability—except to the extent they are legally compelled to do so.

NYCH Brief, pp. 3-4.

Absent this Court's intervention, the Seventh Circuit's opinion will defeat the purpose of the EFAA. The Seventh Circuit's erroneous decision places all banks in the same precarious position as faced by Petitioner which has already suffered an actionable loss for which it will have no remedy. In the face of increased risk mandated by the funds availability provisions of the EFAA, the Seventh Circuit has stripped all banks of their ability to avail themselves of the judicial remedy Congress intended and implemented in the EFAA through its delegation to the Federal Reserve Board.

II.

The Seventh Circuit improperly ignored precedent establishing that there is subject matter jurisdiction under 28 U.S.C. Sec. 1331 because this cause arose under the laws of the United States.

As indicated above, the Seventh Circuit's decision conflicts with the plain language of the EFAA wherein it provides a specific grant of authority to pursue actions for civil liability in the Federal district courts. However, not only did the Seventh Circuit ignore the unambiguous statutory language, but it also ignored precedent concerning the application and interpretation of the general jurisdictional statute, Title 28 U.S.C. 1331. The reviewing court's conclusion could thereby impact every analysis undertaken to determine under what circumstances a federal governmental agency's regulation rises to the level of a law for purposes of Section 1331.

Pursuant to the general federal question jurisdictional statute, "[t]he district courts shall have original jurisdiction of all civil actions arising under . . . laws . . . of the United States." 28 U.S.C. Sec. 1331. When construing Section 1331, courts have repeatedly recognized that for general jurisdictional purposes, rules and regulations promulgated by governmental agencies pursuant to a mandate or a delegation of Congressional authority have the force and effect of laws. *Chasse v. Chasen*, 595 F.2d 59 (1st Cir. 1979)[8]; *Farmer v. Philadelphia Electric Company*, 329 F.2d 3 (3rd Cir. 1964). (Citations omitted.) "In general, this [the reference to laws of the United States in Section 1331] means that there is jurisdiction of a claim arising under an Act of Congress or an **administrative regulation or executive order** made

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[8] In *Chasse* the court indicated two (2) factors which must be weighed to determine if the agency regulation rises to the level of a law for jurisdictional purposes: (1) the statutory authority for the promulgation; and (2) the formality of the promulgation. Although the court in *Chasse* did not reach the issue concerning formality, there can be no question that Regulation CC would pass any such test. Prior to its codification, it passed scrutiny through publication in the Federal Register as required by the Administrative Procedure Act, Title 5 U.S.C. Sec. 551 *et seq.*, and then was officially promulgated as reflected by its citation in the Code of Federal Regulations.

pursuant to an Act of Congress." Wright, Miller & Cooper, Federal Prac ce and Procedure, Jurisdiction 2d, Sec. 3563 at 51 (1984) (emphasis added).

In its recent pronouncements, the Court has determined that an action "arises under" a law of the United States when federal law creates the cause of action. *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 27-28 (1983). The Court has repeatedly confirmed that a " 'suit arises under the law that created the cause of action.' " *Merrell Dow Pharmaceutical v. Thompson*, 478 U.S. 804, 808, (1986) quoting *Franchise Tax Board*, 463 U.S. at 8-9 and *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 at 260 (1916). First Illinois' cause of action, as pled in its complaint, "arises under" federal law because it was federal law that created it, and absent federal law, the cause of action does not exist.

When determining whether a Congressionally authorized agency regulation will support a federal cause of action, the court must look to the regulation itself to see if the regulation contemplates a judicial remedy. *See Stevens v. Carey*, 483 F.2d 188 (7th Cir. 1973) (the Seventh Circuit concluded Executive Order 10988 was insufficient to provide a jurisdictional basis examining only the language of the Executive Order itself which, contrary to Regulation CC, did not expressly or by implication contemplate a judicial remedy for its violation); *Chasse*, *supra*, (a Customs Service Circular on which the plaintiff based his cause of action failed to support federal jurisdiction because the circular itself did not contemplate a judicial remedy); and *Farmer*, *supra*, (after determining that the regulation in question was a law for purposes of Section 1331, the court then examined the regulation, not the statute, in order to analyze whether a judicial remedy was contemplated).

The court's failure to apply the analysis established by precedent has greater implications than merely depriving Petitioner of the remedy to which it is entitled. It will diminish Congress' ability to effectively delegate authority to federal agencies to promulgate regulations to be enforced by private parties in federal court. In the case of Regulation CC and the EFAA, the court's decision has subverted the purpose of the Act, and at best, will lead to the rather anomalous result forcing each state to interpret and apply a Federal Regulation promulgated pursuant to a Federal Statute. Certainly, the national banking system deserves uniformity in application of Federal Reserve Board regulations and the protection contemplated by Congress when it enacted the EFAA.

CONCLUSION

For each of the foregoing reasons, Petitioner, First Illinois Bank, respectfully requests that this Court grant this Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-3251

FIRST ILLINOIS BANK & TRUST,
an Illinois Banking Corporation,

Plaintiff-Appellee,

v.

MIDWEST BANK & TRUST COMPANY,
an Illinois Banking Corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 6324—**Charles P. Kocoras**, *Judge.*

ARGUED APRIL 13, 1994—DECIDED JULY 11, 1994

Before CUMMINGS, EASTERBROOK and MANION, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In April 1992 plaintiff First Illinois Bank & Trust ("First Illinois") filed an amended complaint against Midwest Bank & Trust Company ("Midwest") complaining that Midwest returned a $64,294.27 check unpaid and negligently failed to advise First Illinois that the check was NSF (Not Sufficient Funds). First Illinois claimed Midwest violated its duty under Regulation CC (12 CFR part 229) to give a reason for returning a check unpaid. 12 CFR §§ 229.30(d), 229.33(b)(8). Pursuant

to 12 CFR § 229.38(a), First Illinois sought to recover damages resulting from Midwest's alleged negligence. Subsequently Judge Kocoras granted First Illinois' motion for summary judgment, simultaneously denied summary judgment to Midwest, and entered judgment for First Illinois for $43,912.06, the claimed amount of its loss. The district court found that Midwest had breached the standard of care imposed by Regulation CC by returning the check without advising First Illinois that the check was NSF. Midwest thereafter appealed from the judgment below.

At the April 13, 1994, oral argument in this Court, we questioned whether the district court had jurisdiction over this controversy and ordered both parties to file memoranda concerning that question. We now hold that the district court had no such jurisdiction.

Jurisdiction is supposedly granted under the Expedited Funds Availability Act (12 U.S.C. §§ 4001-4010), in particular by 12 U.S.C. § 4010, titled "Civil liability." Subsection (d) ("Jurisdiction") provides that "any action under this section may be brought in any United States district court. . . ." 12 U.S.C. § 4010(d). But subsection (a) ("Civil liability") limits the application of the section to certain disputes between "any depository institution" and "any person other than another depository institution." 12 U.S.C. § 4010(a). Because the parties concede that both First Illinois and Midwest Bank are "depository institutions" within the meaning of the Expedited Funds Availability Act, 12 U.S.C. § 4001(12), we have no jurisdiction over this dispute.

Disputes such as this, between members of the Federal Reserve System, are to be handled administratively before the Board of Governors of the Federal Reserve System pursuant to 12 U.S.C. § 4009(c)(1). This conclusion is bolstered by the provisions of 12 U.S.C. § 4010(f), which authorize the Federal Reserve Board to establish liability among "depository institutions" such as these parties. Therefore, if plaintiff can state a colorable violation under the Regulations, it must make its case before the Board of Governors rather than the federal courts.

The purpose of the Expedited Funds Availability Act is to require banks to make funds available to depositors quickly. Thus the depositors have rights, enforceable in court, while the banks have obligations, which the Federal Reserve Board may establish by regulation and enforce in administrative proceedings.

The judgment below is vacated and the action is remanded to the district court with instructions to dismiss it for want of jurisdiction.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: July 11, 1994

BEFORE:

Honorable WALTER J. CUMMINGS, Circuit Judge
Honorable FRANK H. EASTERBROOK, Circuit Judge
Honorable DANIEL A. MANION, Circuit Judge

No. 93-3251

FIRST ILLINOIS BANK & TRUST,
an Illinois Banking Corporation,

Plaintiff-Appellee

v.

MIDWEST BANK & TRUST COMPANY,
an Illinois Banking Corporation,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 92 C 6324, Charles P. Kocoras, Judge

The judgment of the District Court is VACATED and the case is REMANDED with instructions, in accordance with the decision of this court entered on this date. Each party shall bear their own costs.

[August 31, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 92 C 6324

FIRST ILLINOIS BANK TRUST,
an Illinois Banking Corp.,

Plaintiff,

v.

MIDWEST BANK & TRUST COMPANY,
an Illinois Banking Corp.,

Defendant.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the Court on the parties' cross-motions for summary judgment. For the reasons stated below, summary judgment is granted in favor of the plaintiff.

BACKGROUND

The plaintiff, First Illinois Bank & Trust ("First Illinois") brings this action against defendant, Midwest Bank & Trust ("Midwest"), alleging that Midwest breached its regulatory duty to use ordinary care and to act in good faith in returning a check to First Illinois. The parties have stipulated to the following uncontested facts.

Both First Illinois and Midwest are engaged in the business of banking and use as their clearing house for collection the Federal Reserve Bank of Chicago. Accordingly, both banks are subject to the provisions of 12 C.F.R. Part 229 (1993).

In September of 1991, one of First Illinois' commercial depositors was Panadyne Telecom ("Panadyne"). On September 25, 1991, Panadyne deposited in its account at First Illinois a check for $64,294.27. Panadyne was the payee and Magna Card Corporation ("Magna Card") was the maker of the check. Magna Card's check was drawn upon its account at Midwest.

On September 25, First Illinois, using normal banking channels, forwarded the check in question through the Federal Reserve System for collection. Midwest received the check through the Federal Reserve System on September 26, 1991. At that time, Margaret Straumann, a Midwest employee of thirty-two years, segregated the check as a large item according to bank policy. Straumann then examined the check for proper endorsement, again in accordance with established policy. Straumann found that First Illinois' proof stamp on the back of the check was so faint that it was illegible to her. Having determined that the endorsement did not conform to Midwest's standards, Straumann decided to return the check. She therefore placed Midwest's return stamp on the face of the check and noted that the reason for its return was for "guarantee of endorsement."

Under Midwest's procedures, when Midwest returns a check for guarantee of endorsement, it is not the practice of Midwest to further examine the depositor's account for available funds to pay the check if the endorsement has not satisfied its standards. On September 26, the day

the check was first presented for payment, Midwest's records reflected that the Magna Card account had a balance of $275.31. If Straumann had not returned the item for the guarantee of endorsement, under bank policy the check would have continued to be processed and the next morning, September 27, 1991, the check would have appeared on the overdraft report and returned for non-sufficient funds ("NSF") that day. Moreover, if Straumann had known at the time she returned the check for guarantee of endorsement that the check was NSF, she would have indicated it was NSF when she returned the check.

First Illinois received the returned check on September 27, 1991. Midwest and First Illinois have the same procedure when a check that has been deposited to its depositor's account is returned by another bank for guarantee of endorsement. The procedure is to verify whether the payee received credit for the funds, and if it did, the bank will affix its guarantee of endorsement stamp and redeposit the check for clearance through the Federal Reserve System. Mary Ann Dahms, a First Illinois employee, followed this procedure upon receipt of the returned check, redepositing it on September 27, 1991.

Midwest states that although it, like First Illinois, would not "charge back" a check returned for missing endorsement, Midwest might place a freeze on the account so that there could not be a withdrawal against those uncollected funds. When deposits of over $5,000 are received by Midwest's tellers, however, those tellers do not at that time normally give notice to the customer that any of the amount represented by that deposit will be held frozen for longer than normal policy recommends.

The redeposited check reached Midwest on Monday, September 30, 1991. Midwest processed the check and

generated a report showing that there were insufficient funds in Magna Card's account to pay the check. On October 1, Midwest again dishonored the check and returned it unpaid. This time the reason given for the return was NSF.

First Illinois and Midwest both publish their fund availability policies. These policies are set forth in brochures that each bank publishes and distributes to depositors. Both First Illinois and Midwest make funds available to depositors the next business day following the deposit. First Illinois does reserve the right to delay making funds available if it believes a check will not be paid or if the depositor has deposited checks totalling more than $5,000. In practice, however, First Illinois makes all deposits, regardless of amount, available for withdrawal the next business day after deposit. The only exceptions to this practice are not applicable in this case.

In accordance with its policy, First Illinois allowed Panadyne to withdraw thousands of dollars from its account over the period between September 26 and September 30, prior to the time it was given NSF notice by Midwest. As a result of these withdrawals, First Illinois paid out $43,916.06 that to date have gone uncollected. In its motion for summary judgment, First Illinois contends that Midwest owes it the amount it has lost, $43,916.06, due to Midwest's failure to advise First Illinois of the NSF status of the Magna Card check when it was first returned. Midwest, in its motion for summary judgment, denies that it owes First Illinois the money for a variety of reasons, including absence of duty and failure to establish proximate cause. Before discussing the merits of the parties' contentions, we first address the legal principles used when deciding a motion for summary judgment.

LEGAL STANDARD

Summary judgment is appropriate if the pleadings, answers to interrogatories, affidavits and other materials show "that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A "genuine issue" exists if "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A "material fact" exists only if there is a factual dispute that is outcome determinative under governing law. *Id.* at 248; *Howland v. Kilquist*, 833 F.2d 639, 642 (7th Cir. 1987).

The party seeking summary judgment has the initial burden of showing that no such issue of material fact exists. After a properly supported motion for summary judgment has been made, the opposing party then must "set forth specific facts showing that there is a genuine issue for trial." *Id.* Like the movant, the nonmovant may not rest upon mere allegations in the pleadings or upon conclusory statements in affidavits; rather he must support his contentions with proper documentary evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Howland*, 833 F.2d at 642. We view the record and all inferences drawn from it in the light most favorable to the party opposing the motion, and summary judgment is only appropriate when no reasonable jury could find for the nonmoving party. *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 371 (7th Cir. 1992) (citations omitted).

We apply these principles to the facts of this case.

DISCUSSION

In its motion for summary judgment, First Illinois argues that Midwest did not exercise ordinary care and acted in bad faith in returning the Magna Card check in violation of 12 C.F.R. §§ 229.30(d), 229.33(b)(8), and 229.38(a) (1993). Sections 229.30(d) and 229.33(b)(8) impose on a payor bank such as Midwest an obligation to provide the reason for nonpayment when returning a check unpaid. Section 229.38(a) provides that a "bank shall exercise ordinary care and act in good faith in complying with the requirements of this subpart." First Illinois asserts that Midwest's violation of these regulations caused it to lose $43,912.06.

Ordinary care is that conduct undertaken by a reasonably careful person under similar circumstances. *Hardware State Bank v. Cotner*, 302 N.E.2d 257, 262 (Ill. 1973). In this case, ordinary care is conduct conforming to a general banking usage whereby reasonable commercial standards are employed. *See* 810 ILCS 5/3-103(7) and 5/4-103(c) (1993). After reviewing the facts presented by the parties, it is the view of this Court that Midwest failed to exercise ordinary care because it did not act according to reasonable banking standards.

First Illinois presents evidence in its Statement of Material Facts submitted pursuant to local rule 12(m) showing that at the time of the events in dispute Midwest utilized a procedure to process its checks which was not utilized by any other bank. Midwest's procedure, unlike procedures at other banks, allowed a check to be returned for the reason that it was missing an endorsement without the bank first knowing that it was NSF. First Illinois bases its claim that Midwest utilized an uncommon system on testimony by Mr. Parillo, the Vice President and Cashier at Midwest, who has over thirty years banking

experience. Parillo testified at his deposition that no other bank uses the same procedure as Midwest Bank. In addition, Parillo indicated that no other bank would return a check claiming it was missing an endorsement if that check was also NSF. Every other bank would return the check NSF. First Illinois contends that Midwest's utilization of this unique check-return system resulted in Midwest's failure to advise First Illinois of the NSF status of the check upon its first return and that Midwest's inaction constituted a failure to comply with the standard of ordinary care and good faith imposed by section 229.38(a). We agree.

Although Midwest attempts to discredit the testimony of Parillo, we do not find its efforts convincing. Midwest files no statement of facts in which it denies First Illinois' Statement of Material Facts. Moreover, Midwest offers no evidence countering the statements made by Parillo, that is, evidence from which a reasonable jury could find that it employed a commercially reasonable system of check return.

Our finding that Midwest did not exercise ordinary care in utilizing its unique system of check return is bolstered by the foreseeable consequences to Midwest of employing such a check-return system. Because all other banks would have informed First Illinois that the Magna Card check was NSF if that were the case, First Illinois acted in a reasonably foreseeable manner in assuming that upon receipt of the check the drawer had sufficient funds on account at Midwest to pay. Midwest points to no evidence suggesting that First Illinois knew or suspected that Midwest followed a check-return procedure different from other banks. Furthermore, First Illinois presents persuasive evidence that Midwest probably would have acted similarly to First Illinois in making funds available to

Panadyne at the time and in the manner in which it did. The evidence shows that First Illinois and Midwest employ substantially similar policies regarding crediting customers' accounts. In light of the following, we find that Midwest did not act with ordinary care in returning the check for guarantee of endorsement without first checking the sufficiency of the funds in support of the check. Additionally, we find Midwest's failure to act caused First Illinois to suffer damage in the amount of $43,912.06.

Under the relevant regulations, a payee bank which returns a check unpaid must use ordinary care in giving the reason for return. When the instant check was returned *only* for a guarantee of endorsement and not for any other reason or reasons, it was reasonable for First Illinois to assume that the claimed endorsement defect was the only defect which had to be cured. When the endorsement was guaranteed, it was entirely reasonable for First Illinois to expect the check to be honored, for Midwest had proffered no other reasons, including insufficient funds, as a reason the check failed in going through banking channels. It is simply an untenable position to suggest that is ordinary business practice that the reasons for dishonor can be investigated one at a time and the check returned in successive stages over a substantial period of time, particularly when the means to determine insufficiency of funds, an important reason for dishonor, is readily available. It would have taken minimal effort and time for Ms. Straumann to have made that determination and to have notified First Illinois at the same time as the matter of the endorsement was raised. Failure to timely notify First Illinois of an insufficiency of funds problem, particularly when the effort to discern same was so minimal, permitted First Illinois to reasonably conclude that the endorsement was the *only* problem. Midwest

Bank was in the superior position to detect that problem with the check, and it must now bear the consequences of its own neglect.

Midwest presents several arguments why summary judgment should be granted in its favor, but we find none of them persuasive. For example, Midwest points out that First Illinois was not required to allow withdrawals against the uncollected funds when it did and that Midwest cannot be responsible for actions taken by First Illinois that were not necessitated by Midwest's failure to specify NSF in its first notice. Just because First Illinois was not "required" to allow withdrawals under the regulations, however, does not mean that Midwest should not have reasonably foreseen what damage its breach of ordinary care would cause. The evidence indicates that Midwest employed similar procedures as First Illinois in regard to checks returned for guarantee of endorsement and, therefore, Midwest's argument that it was not reasonably foreseeable that First Illinois would be damaged by its breach is unconvincing.

Midwest additionally argues that, even if it had exercised ordinary care in this case by sending back the check NSF, First Illinois would not have received that notice in time to prevent its loss.[1] Midwest fails to persuade us with this tack because it, *inter alia*, conflicts with Midwest's stipulation that "[h]ad Ms. Straumann not returned the item for the guarantee of endorsement, the check would have continued to be processed and the next morn-

[1] Under section 229.38(a), a bank that fails to exercise ordinary care or act in good faith may be liable to the depository bank in an amount equal to "the loss incurred up to the amount of the check, reduced by the amount of the loss that party would have incurred even if the bank had exercised ordinary care."

ing [Sept. 27] it would have appeared on the overdraft report and returned "NSF" *that day.*" (emphasis added). Although it is not clear exactly when the check returned NSF would have been received by First Illinois, the evidence shows that Midwest would have placed a phone call to First Illinois notifying it of the NSF status of the Magna Card check on September 27, thereby preventing the loss in question. Accordingly, Midwest's motion for summary judgment is denied.

CONCLUSION

For the reasons stated above, summary judgment is granted in favor of the plaintiff.

/s/ Charles P. Kocoras
Charles P. Kocoras
United States District Judge

Dated: August 31, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

First Illinois Bank & Trust
v.
Midwest Bank & Trust Co.

CASE NUMBER: 92 C 6324

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment is entered in favor of the plaintiff and against defendant in the amount of $43,912.06. Final judgment entered.

August 31, 1993
Date

/s/ H. Stuart Cunningham
Clerk

/s/
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 92 C 6324 Date: Tue 31 Aug 1993

Name of Assigned Judge: Charles P. Kocoras

Case Title: First Illinois Bank Trust -v- Midwest Bank & Trust Co.

* * * * *

DOCKET ENTRY:

* * * * *

(10) ☒ [Other docket entry] Ruling held. ENTER MEMORANDUM OPINION: Defendant's motion (Doc 39-1) for summary judgment is denied. Plaintiff's motion (Doc 37-1) for summary judgment is granted in the amount of $43,912.06. Final judgment entered. All other pending motions, if any, are hereby moot.

(11) ☒ [For further detail see order attached to the original minute order form.]

* * * * *

[November 25, 1992]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 92 C 6324

FIRST ILLINOIS BANK & TRUST,
an Illinois banking corporation,
Plaintiff,

v.

MIDWEST BANK & TRUST COMPANY,
an Illinois banking corporation,
Defendant.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the Court on defendant's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the following reasons, we deny defendant's motion.

LEGAL STANDARD

The defendant asks this Court to dismiss plaintiff's case pursuant to Federal Rule of Civil Procedure 12(b)(6). A defendant must meet a high standard in order to have a complaint dismissed for failure to state a claim upon which relief may be granted. In ruling on a motion to dismiss, the court must construe the complaint's allegations in the light most favorable to the plaintiff. *Scheuer v.*

Rhodes, 416 U.S. 232, 235 (1974). The allegations of the complaint should be construed liberally, and a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conly v. Gibson*, 355 U.S. 41, 45-46 (1957); *Doe on Behalf of Doe v. St. Joseph's Hospital*, 788 F.2d 411 (7th Cir. 1986). A complaint will not be dismissed on mere vagueness. *Strauss v. Chicago*, 760 F.2d 765, 767 (7th Cir. 1985). We address defendant's motion with these principles in mind.

FACTUAL BACKGROUND

The plaintiff, First Illinois Bank & Trust ("First Illinois"), brings this action against the defendant, Midwest Bank & Trust Company ("Midwest"). First Illinois alleges that Midwest breached its regulatory duty to use ordinary care and to act in good faith in returning a check to First Illinois.

First Illinois claims that on or about September 25, 1991, its customer, Pandayne Telecom ("Pandayne"), deposited a check with First Illinois for $64,294.27. The check was drawn by Magna Card on its account at Midwest. First Illinois, upon receiving the check from Pandayne, sent the check for collection to Midwest through normal banking channels. According to First Illinois, on this date, Magna Card possessed insufficient funds in its account at Midwest to pay the $64,294.27 check.

First Illinois contends that on September 26, Midwest returned the check to First Illinois. Midwest indicated on the face of the check that the reason for its return was that it was not endorsed properly. Midwest did not indicate on the face of the check that Magna Card possessed

insufficient funds in its account to pay the balance of the check.

Between September 26 and October 1, First Illinois believed that Magna Card possessed sufficient funds to pay the check to Pandayne. Acting upon this belief, First Illinois credited Pandayne's account for $64,294.27. Pandayne made withdrawals against this sum in the amount of $43,912.06. On October 1, Midwest notified First Illinois that there were insufficient funds in Magna Card's account to pay Pandayne. First Illinois immediately set off the remaining balance in Pandayne's account.

In its complaint, First Illinois alleges two counts against Midwest. In its first count, First Illinois charges that Midwest failed to exercise ordinary care in the manner it returned the check to First Illinois. First Illinois claims that Midwest (1) erroneously returned the check stating that the endorsement or the guaranty of that endorsement was improper; and/or (2) failed to check Magna Card's account to determine if there were sufficient funds in the account to pay the check prior to returning it unpaid for the sole reason that the endorsement was improper; and/or (3) failed to notify plaintiff in a timely manner that there were insufficient funds in Magna Card's account to pay the check. In its second count, First Illinois charges that Midwest acted in bad faith in the collusive manner it returned the check to First Illinois. First Illinois contends that both Midwest and Magna Card knew that there were insufficient funds in Magna Card's account on or before the date of September 26. In spite of this, Magna Card is alleged to have requested that Midwest return the check without advising First Illinois of the insufficient funds, in order to induce First Illinois into believing sufficient funds existed.

In response to First Illinois' allegations, Midwest has filed this motion to dismiss, alleging that First Illinois possesses no legal basis for its claims. Because we find that First Illinois states a sufficient basis for relief, we deny Midwest's motion.

DISCUSSION

First Illinois claims that Midwest did not exercise ordinary care or act in good faith in complying with the following Federal Reserve regulations: 12 C.F.R. §§ 229.30(d), 229.33(a), and 229.33(b)(8) (1992). Section 229.30(d) requires a paying bank that is returning a check to clearly indicate on the face of the check that it is a returned check and the reason for its return. Section 229.33(a) requires the paying bank that decides to return a check to provide notice of nonpayment to the depository bank by 4:00 p.m. on the second business day following the banking day on which the check was presented to the paying bank. Under § 229.33(b)(8), the notice of return must include the reason for nonpayment.

First Illinois alleges that Midwest acted in violation of 12 C.F.R. § 229.38(a), a Federal Reserve regulation that requires banks to "exercise ordinary care and act in good faith in complying with the requirements" of subpart 229. Under § 229.38(a), a paying bank that fails to exercise ordinary care or act in good faith may be liable to the depository bank for damages.

The parties dispute how § 229.38(a) should be applied to the facts of this case. The comments to § 229.38(a) provide a clue as to how this provision should be applied. They indicate that the standard of care established by § 229.38(a) is similar to the standard imposed by U.C.C. §§ 1-203 and 4-103(1). *See* 12 C.F.R. Appendix E, com-

ments on § 229.33(a).[1] U.C.C. § 1-203 states that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 4-103 provides that a bank is responsible to act with ordinary care and in good faith in relation to other banks. U.C.C. § 4-103(a). Moreover, this section provides that a bank in compliance with the Federal Reserve regulations has *prima facie* exercised ordinary care. U.C.C. § 4-103(c).

Midwest argues that under its interpretation of the Federal Reserve regulations at issue in this case, it has met all applicable regulatory requirements. Therefore, Midwest claims that under U.C.C. § 4-103(c) it has *prima facie* exercised ordinary care. Midwest, however, fails to persuade this Court. First Illinois alleges in its complaint that Midwest has not complied with the Federal Reserve regulations. It claims that Midwest violated § 229.38(a) in failing to exercise ordinary care and good faith in the manner in which it returned the Pandayne check. The question of how to interpret the provisions of subpart 229 at issue in this case, § 229.30(d) (interpreting what constitutes a good-faith reason for returning a check) and §§ 229.38(a) and 229.38(b)(8) (interpreting whether timely and adequate notice was given in good faith), are questions of fact that will turn on reasonable commercial standards of fair dealing. Midwest's argument that U.C.C. § 4-103(c) absolves it of liability is unsupported.

In addition, Midwest fails to acknowledge the comments' analogy to U.C.C. § 1-203. We believe that U.C.C. § 1-203's general notion of good faith and fair dealing would em-

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[1] The comments also indicate that liability for wrongful dishonor under U.C.C. § 4-402 is different from a failure to exercise ordinary care under § 229.38(a). 12 C.F.R. Appendix E, comments to § 229.38(a).

brace First Illinois' allegations of misidentification and collusion. Furthermore, we note that a recent amendment to subpart 229 defines § 229.38(a)'s standard of good faith to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing." 57 Fed. Reg. 46,972; 46,975 (October 14, 1992) (to be codified at 12 C.F.R. § 229.2(nn)). Based on the foregoing, we conclude that First Illinois should be allowed to prove its claims based on § 229.38(a). Hence, we deny Midwest's motion to dismiss.

/s/ Charles P. Kocoras
Charles P. Kocoras
United States District Judge

Dated: November 25, 1992

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 92 C 6324 Date: 25 Nov 1992

Name of Assigned Judge: Charles P. Kocoras

Case Title: First Illinois Bank Trust -v- Midwest Bank & Trust Co.

* * * * *

DOCKET ENTRY:

MINUTE ORDER of 11/25/92 by Hon. Charles P. Kocoras: Enter memorandum opinion that defendant's motion to dismiss plaintiff's action for failure to state a claim is denied [8-1]. Answer to complaint is due 12/15/92. Status hearing is set for 12/28/92 at 9:30 a.m. Mailed notice (1g) [Entry date 11/27/92]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 20, 1994

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

FIRST ILLINOIS BANK & TRUST,
an Illinois Banking Corporation,

Plaintiff-Appellee,

No. 93-3251 *vs.*

MIDWEST BANK & TRUST COMPANY,
an Illinois Banking Corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 6324—Charles P. Kocoras, *Judge.*

ORDER

The opinion dated July 11, 1994, is hereby amended by substituting the following paragraph for the last paragraph on page 2:

> Disputes such as this, between members of the Federal Reserve system, are to be handled administratively before the Board of Governors of the Federal Reserve System pursuant to 12 U.S.C. § 4009(c)(1)

> (or perhaps in state court). This conclusion is bolstered by the provisions of 12 U.S.C. § 4010(f), which authorize the Federal Reserve Board to establish liability among "depository institutions" such as these parties. Although the Board of Governors has informed us that no mechanism is currently available for administrative resolution of such disputes, the Board's differing interpretation of this statute cannot confer jurisdiction upon the Court.

On August 25, 1994, plaintiff-appellee filed a petition for rehearing with suggestion for rehearing *en banc*. On August 29, 1994, by leave of Court, the Board of Governors of the Federal Reserve System, the New York Clearing House Association and the Standard Bank and Trust Company filed briefs *amici curiae* in support of the petition for rehearing.

No judge in active service has requested a vote on the suggestion for rehearing *en banc* and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

No. 94-1175

IN THE

Supreme Court United States

OCTOBER TERM, 1994

BANK ONE, CHICAGO, N.A.
an Illinois Banking Corporation,
Petitioner,

v.

MIDWEST BANK & TRUST COMPANY,
an Illinois Banking Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals erred in holding that section 611 of the Expedited Funds Availability Act did not confer federal jurisdiction over this check collection dispute between two Illinois depository institutions.

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MIDWEST BANK & TRUST COMPANY,
an Illinois Banking Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Midwest Bank & Trust Company, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 30 F. 3d 64.

OPINION BELOW

The opinion reproduced in the Appendix to the Petition for a Writ of Certiorari at App. 1-3 differs from the opinion which is reported at 30 F.3d 64. On July 11, 1994 the Court of Appeals filed an opinion. On September 20, 1994, after a petition for rehearing and briefs *amici curiae* in support of that petition had been filed, the Court of Appeals amended its initial opinion. The opinion reproduced in the Appendix to the petition does not reflect the September 20, 1994 amendment. The opinion reported at 30 F.3d 64 is the amended version and specifically states that it is the opinion "as amended on Denial of Rehearing September 20, 1994." *Id.* The opinion as amended and reported at 30 F.3d 64 is printed at pages A1-A4 in the Appendix to this brief.

STATUTES

In addition to the statutory provision contained in the petition, the following statutory provision is involved:

810 ILCS 5/4-103

§4-103. Variation by agreement; measure of damages; action constituting ordinary care.

(a) The effect of the provisions of this Article may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable.

(b) Federal Reserve regulations and operation circulars, clearing-house rules, and the like have the effect of agreements under subsection (a), whether or not specifically assented to by all parties interested in items handled.

(c) Action or non-action approved by this Article or pursuant to Federal Reserve regulations or operating circulars is the exercise of ordinary care and, in the absence of special instructions, action or non-action consistent with clearing-house rules and the like or with a general banking usage nor disapproved by this Article, is prima facie the exercise of ordinary care.

* * * *

REASONS FOR DENYING THE WRIT

I.
THE DECISION OF THE COURT OF APPEALS DOES NOT DEPRIVE DEPOSITORY INSTITUTIONS OF A FORUM FOR RESOLVING THE TYPE OF DISPUTE INVOLVED IN THIS CASE

The present case involves a dispute between two Illinois banks. Petitioner asserts that the Expedited Funds Availability Act ("EFAA") and regulations promulgated under it create federal jurisdiction over its claim that respondent was negligent in the return of a check drawn on insufficient funds. Petitioner recognizes that prior to the EFAA there was no federal jurisdiction over such disputes. Nevertheless, attacking the unamended version of the opinion rather than the amended version of the opinion which is reported at 30 F.3d 64, petitioner incorrectly argues that the Court of Appeals decision will "wreak havoc" by depriving depository institutions of a forum for resolving such disputes. (petition pp. 7-8). The Court of Appeals, however, amended its decision to make clear that it was not depriving depository institutions of the judicial forum that has been, and continues to be, used to resolve similar disputes.

A.
FEDERAL RESERVE REGULATIONS ARE INCORPORATED INTO THE UNIFORM COMMERCIAL CODE AND ENFORCEABLE IN STATE COURTS

Regulation CC (12 C.F.R. Part 229) is incorporated into the Uniform Commercial Code ("UCC") by section 4-103 of the UCC (810 ILCS 5/4-103). Section 4-103(a) of the UCC provides that: "[t]he effect of the provisions of this article may be varied by agreement . . . ." UCC section 4-103 (b) provides: "Federal Reserve regulations and operating circulars, clearing house rules, and the like have the effect of agreements under subsection (a), whether or not specifically assented to by all parties interested in items handled." Subsection (c) provides that "action or non-action . . . pursuant to Federal Reserve regulations or operating circulars constitutes the exercise of ordinary care . . . ." Thus, as the Court recognized in *Appliance Buyers Credit Corp v. Prospect National Bank*, 505 F. Supp. 163, 164 (C.D. Ill. 1981) *Aff'd* 708 F.2d 290 (7th Cir. 1983), by its own terms the UCC is modified by Federal Reserve regulations and therefore, under state law the rights and duties of the banks in disputes such as this are governed by the Federal Reserve regulations. Also see *e.g. United Postal Savings Association v. Royal Bank Mid-County*, 784 S.W. 2d 906 (Mo. Ct. App. 1990), where the Court applied 12 C.F.R. § 210 through UCC § 4-103. *Id.* 784 S.W. 2d at 908 N. 4.

B.
THE COURT OF APPEALS AMENDED ITS DECISION IN RESPONSE TO THE BRIEFS FILED IN SUPPORT OF THE PETITION FOR REHEARING

Disputes similar to the dispute involved in the present case have been decided by state courts under the UCC (which incorporates the federal regulations). *See e.g. United Postal Savings Association v. Royal Bank Mid-County*, 784 S.W. 2d 906 (Mo. Ct. App. 1990).[1] However, under the initial version of the opinion it may have been unclear whether the Court intended to foreclose state courts from hearing such disputes. It was in that context that the Federal Reserve Board filed a brief in support of the petition for rehearing. At pages 7-8 of the petition there is an abridged quotation from page 3 of the Board's brief. That statement at page 3 of the Board's brief states in pertinent part:

> The administrative forum hypothesized by the panel does not exist within any of the financial institution regulation agencies responsible for enforcing the EFA Act, *and the panel decision even calls into question state court jurisdiction over EFA Act interbank check collection actions*. Accordingly, the decision leaves payment system participants without a forum for vindication of their EFA Act causes of action, and casts doubt upon the availability of any single forum for the resolution of check payment system disputes.

[1] When diversity jurisdiction existed they have also been decided by Federal Courts. *See e.g. Appliance Buyers Credit Corp. v. Prospect National Bank of Peoria*, 708 F.2d 290 (7th Cir. 1982); *Marcoux v. Van Wyk*, 572 F.2d 661 (8th Cir. 1978).

(Emphasis added to the portion omitted from the quotation in the petition). Similarly, the quotation at page 12 of the petition is from a brief directed to the initial decision of the Court of Appeals rather than the amended version which is reported.

The amended version of the opinion cures, or at the very least, substantially ameliorates the concerns raised in the quoted portions of the amicus briefs filed in support of rehearing. In response to those briefs, the Court of Appeals amended its opinion to make clear that depository institutions may present their claims in the state court. However, as the court also pointed out, the fact that no mechanism is currently available for administrative resolution of such disputes cannot confer federal jurisdiction. *Id.* 30 F. 3d at 65, A3.

II.
THE COURT OF APPEALS DECISION IS CORRECT

The sole issue presented by the petition is whether section 611 of the Expedited Funds Availability Act ("EFAA") (12 U.S.C. § 4010) created federal jurisdiction over this check collection action between two Illinois depository institutions. The Court of Appeals correctly held that section 611 does not confer federal jurisdiction in this case.

Section 611(a) of the EFAA creates a cause of action against depository institutions for failure to comply with the EFAA or regulations prescribed under it. That section, however, specifically excludes from that cause of action disputes such as the present case. It expressly

excludes disputes between two depository institutions. Regulation CC is promulgated under the authority of section 611(f) and those regulations are therefore included in the cause of action in section 611 (a). Thus, if petitioner were not a depository institution, section 611(a) would create a cause of action, and section 611(d) would confer federal jurisdiction because it then would be an action created by section 611(a).

Petitioner and respondent, however, are both depository institutions. Petitioner's claim is therefore expressly excluded from the cause of action created under section 611(a). Thus, the Court of Appeals correctly concluded that section 611(d) does not confer federal jurisdiction.

Despite Congress' express exclusion of actions between two depository institutions in section 611(a), petitioner appears to argue that because Congress has delegated to the Federal Reserve Board the authority to promulgate regulations under section 611(f), it has somehow by implication delegated to the Board the authority to confer federal jurisdiction. Petitioner's position is incorrect. It would negate Congress' express exclusion of disputes between two depository institutions. It also is contrary to the basic principle that: "[f]ederal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area School District*, 475 US 534, 541, 89 L. Ed. 2d 501, 511 (1986). "[S]tatutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction". *Boelens v. Redman Homes, Inc.*, 748 F. 2d 1058, 1067 (5th Cir. 1984); *also see, Nieto v. Ecker*, 845 F.2d 868, 871 (9th Cir. 1988).

The Federal Reserve Board does not have the power to confer federal jurisdiction. The Court of Appeals was correct in holding that Congress has not conferred federal jurisdiction over EFAA disputes between two depository institutions.

CONCLUSION

For the above-stated reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

FIRST ILLINOIS BANK & TRUST, an Illinois Banking Corporation,
Plaintiff-Appellee,
v.
MIDWEST BANK & TRUST COMPANY, an Illinois Banking Corporation,
Defendant-Appellant.

No. 93-3251

United States Court of Appeals,
Seventh Circuit.

Argued April 13, 1994.

Decided July 11, 1994.

As Amended on Denial of Rehearing Sept. 20, 1994.

Before CUMMINGS, EASTERBROOK and MANION, Circuit Judges.

CUMMINGS, Circuit Judge.

In April 1992 plaintiff First Illinois Bank & Trust ("First Illinois") filed an amended complaint against Midwest Bank & Trust Company ("Midwest") complaining that Midwest returned a $64,294.27 check unpaid and negligently failed to advise First Illinois that the check was NSF (Not Sufficient Funds). First Illinois claimed Midwest violated its duty under Regulation CC (12 CFR part 229) to give a reason for returning a check unpaid. 12 CFR §§ 229.30(d), 229.33(b)(8).

Pursuant to 12 CFR § 229.38(a), First Illinois sought to recover damages resulting from Midwest's alleged negligence. Subsequently Judge Kocoras granted First Illinois' motion for summary judgment, simultanteously denied summary judgment to Midwest, and entered judgment for First Illinois for $43,912.06, the claimed amount of its loss. The district court found that Midwest had breached the standard of care imposed by Regulation CC by returning the check without advising First Illinois that the check was NSF. Midwest thereafter appealed from the judgment below.

At the April 13, 1994, oral argument in this Court, we questioned whether the district court had jurisdiction over this controversy and ordered both parties to file memoranda concerning that question. We now hold that the district court had no such jurisdiction.

Jurisdiction is supposedly granted under the Expedited Funds Availability Act (12 U.S.C. §§ 4001-4010), in particular by 12 U.S.C. § 4010, titled "Civil liability," Subsection (d) ("Jurisdiction") provides that "any action under this section may be brought in any United States district court...." 12 U.S.C. § 4010(d). But subsection (a) ("Civil liability") limits the application of the section to certain disputes between "any depository institution" and "any person other than another depository institution." 12 U.S.C. § 4010(a). Because the parties concede that both First Illinois and Midwest Bank are "depository institutions" within the meaning of the Expedited Funds Availability Act, 12 U.S.C. § 4001(12), we have no jurisdiction over this dispute.

Disputes such as this, between members of the Federal Reserve System, are to be handled administratively before the Board of Governors of the Federal Reserve System pursuant to 12 U.S.C. § 4009(c)(1) (or perhaps in state court). This conclusion is bolstered by the provisions of 12 U.S.C. § 4010(f), which authorize the Federal Reserve Board to establish liability among "depository institutions" such as these parties. Although the Board of Governors has informed us that no mechanism is currently available for administrative resolution of such disputes, the Board's differing interpretation of this statute cannot confer jurisdiction upon the Court.

The purpose of the Expedited Funds Availability Act is to require banks to make funds available to depositors quickly. Thus the depositors have rights, enforceable in court, while the banks have obligations, which the Federal Reserve Board may establish by regulation and enforce in administrative proceedings.

The judgment below is vacated and the action is remanded to the district court with instructions to dismiss it for want of jurisdiction.

ORDER

Sept. 20, 1994

The opinion dated July 11, 1994, is hereby amended by substituting the following paragraph for the last paragraph on page 65:

> [Editor's Note: Amendment incorporated for purpose of publication.]

On August 25, 1994, plaintiff-appellee filed a petition for rehearing with suggestion for rehearing *en banc*. On August 29, 1994, by leave of Court, the Board of Governors of the Federal Reserve System, the New York Clearing House Association and the Standard Bank and Trust Company filed briefs *amici curiae* in support of the petition for rehearing.

No judge in active service has requested a vote on the suggestion for rehearing *en banc* and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

No. 93-1179

In the

Supreme Court of the United States

October Term, 1993

BANK ONE, CHICAGO, N.A.,

Petitioner,

v.

MIDWEST BANK & TRUST COMPANY,
an Illinois Banking Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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No. 94-1175

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BANK ONE, CHICAGO, N.A.,

Petitioner,

v.

MIDWEST BANK & TRUST COMPANY,
an Illinois Banking Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

Petitioner, Bank One, Chicago, N.A., states the following in reply to Respondent's Brief in Opposition, and respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on July 11, 1994.

ARGUMENT

I.

THE SEVENTH CIRCUIT COURT OF APPEALS' DECISION DEPRIVES PETITIONER AND ALL MEMBER INSTITUTIONS OF THE CONGRESSIONALLY MANDATED JUDICIAL FORUM ESTABLISHED IN 12 U.S.C. 4010.

In its argument, Respondent ignores the only issue presented in the Petition for a Writ of Certiorari—whether the Seventh Circuit erred by holding that the Expedited Funds Availability Act does not support federal jurisdiction for inter-bank disputes arising under Federal Reserve Board Regulation CC—instead choosing to focus on the fact that in the order amending its original decision, the Seventh Circuit added a few words chastising the Federal Reserve Board while at the same time it clarified that it was not precluding the possibility that a bank could, perhaps, file an action arising under Regulation CC in state court.[1] However, the Seventh Circuit's order amending its original erroneous decision does not alter its fundamental impact: Petitioner and all member institutions of the Federal Reserve System have been deprived of the essential federal judicial remedy established by Congress in the Expedited Funds Availability Act.

Ignoring the issue presented, Respondent, instead, chooses to raise a red herring, claiming that since federal regulations are incorporated into the Uniform Commercial Code and have the effect of agreements, Petitioner's claim can readily be adjudicated in state court as are other U.C.C. controversies. Respondent misses the point: all banks will

[1] In its brief, Respondent charges that Petitioner failed to include the order amending the original decision in the Appendix to its Petition for Certiorari. This is false. In accordance with Supreme Court Rule 14.1(k)(iii), the order is printed in the Appendix at pages 24-25.

still be deprived of the federal remedy provided by Congress.

Even if a bank can bring its action in state court, there is good reason Congress provided a federal remedy to avoid banks' being forced into state court with nowhere else to turn. In fact, the case *sub judice* represents a prime example why relying on state forums to redress inter-bank disputes arising under Regulation CC is unacceptable. Petitioner originally filed this suit in the Circuit Court of Cook County, Illinois. Despite the federal regulation, the state court granted Respondent's motion to strike almost the identical complaint which was subsequently filed in the district court, and based upon which the district court granted summary judgment to Petitioner.

It is for this reason that the Federal Reserve Board argued in its Petition for Rehearing before the Seventh Circuit that "if uncorrected, [the Seventh Circuit's decision] would disrupt the system of interbank liability crafted in response to the EFA Act and replace it with, at best, a hodge-podge of inefficient procedures . . . ." *Brief For Board of Governors of the Federal Reserve System as Amicus Curiae in support of Plaintiff-Appellee's Petition for Rehearing*, p. 3. It is to avoid the possibility that 50 states will develop 50 different bodies of case law in their interpretation of a federal regulation that Congress established federal jurisdiction for inter-bank disputes arising from violations of Regulation CC.

At the same time, it is unclear whether Petitioner here, or other similarly situated banks, will ever have a forum in which to resolve this type of dispute on the merits. Under Illinois law, it is possible that Petitioner might be precluded from filing this claim in state court since the statute of limitations expired while the matter was pending in federal court. Thus, although the district court has already ruled

Petitioner is entitled to relief on the merits, it might never obtain this relief. If the Seventh Circuit's decision is not reversed, Petitioner will never obtain a binding adjudication on the merits of its claim.

It is imperative that this Court resolve this dispute to prevent other banks from being placed in the same quandary. Until the Court does so, other banks will be forced to choose whether to file their suits in the district courts, running the risk that their suits will be dismissed for want of jurisdiction while the state court statute of limitations expires, or voluntarily file in state court, despite Congress' and the Federal Reserve Board's intention that the matters be heard in federal court.

II.

THE SEVENTH CIRCUIT ERRED BY HOLDING NO FEDERAL JURISDICTION EXISTS.

In its Petition, Petitioner focused on the importance of the issue presented rather than the substance of its claim. Although the latter will be addressed in its brief on the merits, Petitioner must reply to one (1) argument raised by Respondent in its brief.

At page 8 of its brief, Respondent states: "Regulation CC is promulgated under the authority of section 611(f) [12 U.S.C. 4010(f)] and those regulations are therefore included in the cause of action in 611(a) [12 U.S.C. 4010(a)]." This is a non-sequitor. There is nothing in the statute to suggest that 611(f) (4010(f)) is included in section 611(a) (4010(a)). Both are parts of Section 611, 12 U.S.C. 4010, the Section entitled "Civil liability." As argued in the Petition, since both 611(f) and 611(a) are part of 611, the Congressional grant of jurisdiction in 611(d)—that "any action under this **section** [12 U.S.C. 4010] . . ." (emphasis added) can be brought in federal court—applies to those causes of action arising under both 611(a) and 611(f).

Had Congress intended the jurisdictional reach of Section 611(d) to extend only to Section 611(a), Congress could easily have provided in Section 611(d) that there is federal jurisdiction for "any action arising under **subsection 611(a)** . . ." thereby making it clear that no jurisdiction was intended for those actions under other subsections of section 611, including subsection 611(f). Congress did not do so. Subsection 611(a) governs only those actions between consumers and banks. It does not purport to affect actions, such as this one, between two (2) banks, brought under the regulations promulgated by the Federal Reserve Board in accordance with the Congressional mandate contained in Section 611(f).

CONCLUSION

For each of the foregoing reasons, Petitioner, Bank One, Chicago, N.A. respectfully requests that this Court grant this Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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No. 94-1175

In the Supreme Court of the United States

OCTOBER TERM, 1994

BANK ONE, CHICAGO, N.A., PETITIONER

v.

MIDWEST BANK & TRUST COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Expedited Funds Availability Act, 12 U.S.C. 4001 *et seq.*, grants federal courts jurisdiction over inter-bank disputes concerning the collection of checks.

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v.

MIDWEST BANK & TRUST COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to this Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

The Expedited Funds Availability Act (EFA Act), 12 U.S.C. 4001 *et seq.*, addresses aspects of the national system of payment by check and authorizes the Board of Governors of the Federal Reserve System "to impose on or allocate among depository institutions the risks of loss and liability in connection with any aspect of the payment system." 12 U.S.C. 4010(f). The Board has set out liability

principles in Regulation CC, 12 C.F.R. Pt. 229. Petitioner Bank One, Chicago, N.A., sued respondent Midwest Bank and Trust Company in federal district court and sought to hold Midwest liable in damages for a violation of Regulation CC's requirements. The district court entered summary judgment for Bank One, Pet. App. 5-14, but the court of appeals vacated that judgment and ordered dismissal on the ground that the federal district court lacked jurisdiction over the dispute. *Id.* at 1-3.

1. Congress enacted the EFA Act as Title VI of the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 635, to speed up the availability of funds to bank depositors and to improve the Nation's check payment system. In the area of the check payment system, the EFA Act supplemented an established legal framework governing the interbank check collection process. That framework was constructed largely from state law (Articles 3 and 4 of the Uniform Commercial Code) that established basic legal rights and responsibilities respecting negotiable instruments, bank deposits, and collections. It also included a federal law component (Federal Reserve Board Regulation J) that regulated the process of collection and return of checks and other items handled through the Federal Reserve System. See Regulation J, 12 C.F.R. Pt. 210.

Congress enacted the EFA Act in response to public concern that banks were unduly delaying depositor access to deposited funds by placing temporary "holds" on those deposits. Bank depositors complained that they frequently encountered difficulties in using their checking accounts because of those holds. Banks imposed the holds to protect themselves against the risk that deposited checks

would not be paid, which risk resulted in part from inter-bank delays in the return of "bad checks." The longer that a bank was uncertain whether a check would be paid, the longer the bank maintained the hold to protect itself against the risk of nonpayment. See S. Rep. No. 19, 100th Cong., 1st Sess. 25-28 (1987).

The EFA Act responds to the problem in two ways. First, it imposes specific requirements on banks to hasten the availability of funds to depositors. The Act thus contains provisions setting out funds availability schedules, 12 U.S.C. 4002 (1988 & Supp. V 1993), schedule exceptions, 12 U.S.C. 4003 (1988 & Supp. V 1993), bank disclosure requirements regarding funds availability, 12 U.S.C. 4004, and other related provisions, 12 U.S.C. 4005-4006. Second, the Act authorizes the Federal Reserve Board to reduce the banks' nonpayment risk through improvements in the check payment system. The Act specifically authorizes the Board to consider various changes in its check processing system and to issue implementing regulations. 12 U.S.C. 4008. Because the EFA Act is designed against a background of existing state law governing check collection, it provides that the Board's implementing regulations shall supersede inconsistent state laws, including the Uniform Commercial Code. 12 U.S.C. 4007(b). See generally H.R. Conf. Rep. No. 261, 100th Cong., 1st Sess. 177-182 (1987).

The EFA Act authorizes federal banking agencies to compel banking institutions within the agencies' respective jurisdictions to comply with the Act's statutory and regulatory requirements. See 12 U.S.C. 4009 (1988 & Supp. V 1993). Subsection 4009(a) authorizes enforcement primarily through Section 8 of the Federal Deposit Insurance Act,

12 U.S.C. 1818 (1988 & Supp. V 1993), which allows banking agencies to issue cease-and-desist orders, impose civil penalties, and pursue other sanctions. See 12 U.S.C. 4009(a) (1988 & Supp. V 1993). Subsection 4009(c)(1) grants the Federal Reserve Board residual authority to enforce any requirements that are not "specifically committed to some other Government agency under subsection (a) of this section." 12 U.S.C. 4009(c)(1). See H.R. Conf. Rep. No. 261, *supra*, at 183.

The EFA Act also contains civil liability provisions, which are the subject of this suit. See 12 U.S.C. 4010. Subsection 4010(a) addresses a depository institution's liability to a person or entity other than another depository institution. It states as follows:

> Except as otherwise provided in this section, any depository institution which fails to comply with any requirement imposed under this chapter or any regulation prescribed under this chapter with respect to any person other than another depository institution is liable to such person in an amount equal to the sum of [a prescribed measure of damages].

12 U.S.C. 4010(a). Subsection 4010(f) addresses a depository institution's liability to another such institution arising out of the payment system. It does not impose specific rights or establish a precise measure of damages, but instead states as follows:

> The Board is authorized to impose on or allocate among depository institutions the risks of loss and liability in connection with any aspect of the payment system, including the receipt, payment, collection, or clearing of checks, and any related

> function of the payment system with respect to checks. Liability under this subsection shall not exceed the amount of the check giving rise to the loss or liability, and, where there is bad faith, other damages, if any, suffered as a proximate consequence of any act or omission giving rise to the loss or liability.

12 U.S.C. 4010(f). Subsection 4010(d) provides for federal court jurisdiction over civil liability suits, stating:

> Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year after the date of the occurrence of the violation involved.

12 U.S.C. 4010(d). The Board has implemented the EFA Act, including specification of the principles governing check collections, through Regulation CC. 12 C.F.R. Pt. 229. See 53 Fed. Reg. 19,433 (1988).

2. Petitioner Bank One (formerly First Illinois Bank and Trust) sued respondent Midwest Bank and Trust in federal district court, alleging that Midwest violated its duties under Regulation CC. Bank One's complaint stated that a Bank One customer had deposited a check drawn on a Midwest account. When Bank One submitted the check to Midwest through normal banking channels for collection, Midwest returned it for a guarantee of endorsement. Bank One provided the guarantee and made the funds available to the Bank One customer. Midwest later refused payment of the check based on insufficient funds in the Midwest payor's account. Bank One contended that Midwest violated its legal obligations by failing to provide timely notice that the payor

lacked sufficient funds to cover the check. Pet. App. 6-8, 18-19.

Midwest moved to dismiss Bank One's suit under Rule 12, Fed. R. Civ. P., on the ground that Bank One had failed to state a claim on which relief could be granted. See Pet. App. 20. The district court denied that motion, holding that Bank One had stated an actionable claim under the Federal Reserve Board's Regulation CC, which requires banks to "exercise ordinary care and act in good faith in complying with" Regulation CC's check collection requirements. 12 C.F.R. 229.38(a). See Pet. App. 20-22. The court ruled on cross-motions for summary judgment that "Midwest did not act with ordinary care in returning the check for guarantee of endorsement without first checking the sufficiency of the funds in support of the check." *Id.* at 12. It entered judgment for Bank One in the amount of $43,912.06. *Id.* at 15-16.

Midwest appealed. The court of appeals questioned during oral argument whether the federal district court had subject matter jurisdiction over the dispute. The court of appeals ordered supplemental briefing, and it later ruled that the EFA Act does not grant federal court jurisdiction over inter-bank disputes. Pet. App. 1-3. The court of appeals concluded that Congress had intended that those disputes would "be handled administratively" under Subsection 4009(c)(1), which grants the Federal Reserve Board residual authority to enforce requirements of the EFA Act that are not "committed to some other Government agency." 12 U.S.C. 4009(c)(1). The court held:

> Therefore, if plaintiff can state a colorable violation under the Regulations, it must make its case before the Board of Governors rather than the federal courts.

Pet. App. 2. The court vacated the judgment and ordered the district court to dismiss the action for lack of jurisdiction. See *id.* at 3.

Bank One petitioned for rehearing, and the Federal Reserve Board filed a brief as amicus curiae supporting that petition. The Board explained that Regulation CC contemplated that inter-bank civil liability claims would be cognizable in federal court, see 12 C.F.R. 229.38(g), and that the Board had not created an administrative mechanism for handling such claims. The court of appeals denied the petition for rehearing, but modified its opinion. It deleted the passage, quoted above, directing Bank One to "make its case before the Board," and it modified the paragraph that had contained that passage to state as follows (additions in italics):

> Disputes such as this, between members of the Federal Reserve system, are to be handled administratively before the Board of Governors of the Federal Reserve System pursuant to 12 U.S.C. § 4009(c)(1) *(or perhaps in state court)*. This conclusion is bolstered by the provisions of 12 U.S.C. § 4010(f), which authorize the Federal Reserve Board to establish liability among "depository institutions" such as these parties. *Although the Board of Governors has informed us that no mechanism is currently available for administrative resolution of such disputes, the Board's differing interpretation of this statute cannot confer jurisdiction upon the Court.*

Pet. App. 24-25.

DISCUSSION

The United States agrees with petitioner that the court of appeals erred in concluding that the EFA Act does not grant federal courts jurisdiction to resolve inter-bank civil liability suits. The court has adopted an implausible construction of the EFA Act that is likely to impair the statute's remedial objectives. The court's decision denies litigants in the Seventh Circuit the federal judicial forum that Congress expressly provided, and it may become an ongoing source of confusion in the banking community. Although this is the first court of appeals decision on the issue and there is no circuit conflict, we believe that it would nevertheless be appropriate for the Court to grant the petition for a writ of certiorari in order to clarify the Act's jurisdictional framework.

1. The EFA Act establishes a civil liability regime for violations of the statute and implementing regulations. 12 U.S.C. 4010. In the case of inter-bank disputes, the Act expressly authorizes the Board "to impose on or allocate among depository institutions the risks of loss and liability in connection with any aspect of the payment system." 12 U.S.C. 4010(f). The precise issue here is whether the Act directs the Board to prescribe an inter-bank cause of action that would be adjudicated through the courts, or to create an inter-bank remedy that would be administered extra-judicially by the Board itself.

The Federal Reserve Board has concluded that Congress intended the Board to create a cause of action that would be pursued through the courts. Congress addressed the question of the appropriate forum for civil liability actions through Subsection 4010(d) of the EFA Act, which states:

> Any action under *this section* may be brought in any United States district court, or in any other court of competent jurisdiction.

12 U.S.C. 4010(d) (emphasis added). That jurisdictional provision extends to all of Section 4010's subsections, including Subsection (f), which authorizes the Board to "impose" or "allocate" inter-bank "liability" in connection with the check payment system. 12 U.S.C. 4010(f). Congress's grant of judicial jurisdiction over "[a]ny action under" Section 4010 indicates that Congress delegated to the Board the quasi-legislative role of prescribing the standard of liability for inter-bank check payment disputes, but preserved the courts' traditional role of adjudicating those disputes. Simply put, the Board prescribes the inter-bank liability standard, which the courts then apply. See 12 C.F.R. 229.38(g).

The Board's construction is consistent with the general structure of Section 4010, which addresses both depositor and inter-bank disputes. Congress was familiar with depositor complaints respecting fund availability, and it dictated the precise standard of liability and the measure of damages that would govern depositor claims. See 12 U.S.C. 4010(a). But Congress apparently recognized that inter-bank check payment disputes could raise technical issues within the Board's specialized knowledge, and it therefore delegated authority to the Board to establish the precise standard under which one bank could hold another bank liable for damages. See 12 U.S.C. 4010(f). Congress relied on the Board to employ its expertise in an extensively regulated area to determine the appropriate contours of an inter-bank cause of action. Congress provided no reason to

doubt, however, that both depositor disputes and inter-bank disputes would be adjudicated in a judicial forum in accordance with Subsection 4010(d), which grants the federal and state courts concurrent jurisdiction over civil liability claims. See 12 U.S.C. 4010(d).

The court of appeals' contrary ruling—which holds that Congress not only gave the Board authority to define the standard of liability, but also the power to adjudicate specific claims—would vest the Board with a highly unusual power. Congress routinely authorizes federal agencies to establish criteria that determine whether one private party is civilly liable to another in a judicial action. See, *e.g.*, Securities Act of 1933, 15 U.S.C. 77k (imposing civil liability for failure to provide registration information required by the Securities and Exchange Commission); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9607(a)(4)(B) (imposing civil liability for environmental response costs that are consistent with the Environmental Protection Agency's national contingency plan). But Congress does not normally vest an administrative agency with authority to adjudicate purely private disputes. If Congress wished to confer that power on an administrative agency, it would be expected to do so explicitly. See Commodity Exchange Act, 7 U.S.C. 18 (1988 & Supp. V 1993); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 919.

This Court indicated in *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989), that it would not lightly infer that Congress has vested an administrative agency with the power to adjudicate private disputes. The Court ruled in *Coit* that the Federal Savings and Loan Insurance Corporation

(FSLIC) lacked authority to establish an administrative claims forum to adjudicate creditors' claims against insolvent thrift institutions. *Id.* at 572-579. The Court explained that "when Congress meant to confer adjudicatory authority on FSLIC it did so explicitly and set forth the relevant procedures in considerable detail." *Id.* at 574. It noted that the FSLIC's authorizing statute contained no such provisions in the case of creditor claims. *Ibid.* Like the statutory provisions in *Coit*, the civil liability provisions of the EFA Act are devoid of indicia demonstrating that Congress intended to vest the Board, rather than the courts, with authority to adjudicate inter-bank disputes. See 12 U.S.C. 4010.

The court of appeals suggested that the Board could exercise such power "pursuant to 12 U.S.C. § 4009(c)(1)," which grants the Board residual authority to "enforce" the EFA Act. See Pet. App. 2, 24-25. Section 4009, however, addresses "[a]dministrative enforcement"—not civil liability—and it authorizes banking agencies to use traditional agency enforcement tools, including cease-and-desist orders and civil sanctions, to compel compliance with the Act. See H.R. Conf. Rep. No. 261, *supra*, at 183 ("[Section 4009] requires the Federal banking regulators to use existing administrative enforcement mechanisms to enforce compliance with [the EFA Act]."). That Section, including Subsection (c)(1), creates no mechanism for the adjudication of inter-bank civil liability claims.

This Court's decision in *Coit* indicates that the EFA Act's administrative enforcement provisions should not be construed to authorize administrative adjudication of private disputes. The Court recognized in *Coit* that the FSLIC had similar

enforcement powers. 489 U.S. at 574. The Court nevertheless treated those powers as distinct from any authority to adjudicate disputes between private parties. See *ibid.* The same result should follow here. Subsection 4009(c)(1) does not contain any reference to administrative adjudication of private disputes, any reference to the Administrative Procedure Act, or any provision for judicial review. It is therefore unlikely that Congress intended that provision to authorize the creation of a novel administrative claims tribunal for inter-bank check collection disputes. See *Coit*, 489 U.S. at 574.

The court of appeals' decision here is additionally questionable because it rejects a reasonable construction of the EFA Act by the agency principally charged with its administration. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). This Court accords "substantial deference" to the Federal Reserve Board's interpretation of banking statutes that the Board administers "whenever its interpretation provides a reasonable construction of the statutory language and is consistent with legislative intent." *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 207, 217 (1984); see *Board of Governors* v. *Investment Company Institute*, 450 U.S. 46, 68 (1981); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971).

The Board has concluded that the EFA Act does not compel administrative adjudication of inter-bank check collection disputes, and in the absence of controlling indications of contrary legislative intent, the court of appeals should have given deference to the Board's interpretation. The Board is the agency that Congress charged with implementing the statute

from its inception, and that agency's reasonable and contemporaneous construction would normally "carry the day against doubts that might exist from a reading of the bare words of a statute." See, *e.g.*, *Good Samaritan Hospital* v. *Shalala*, 113 S. Ct. 2151, 2159 (1993), quoting *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

In rejecting the Board's views, the court of appeals has conferred novel powers on the Board that the Board itself disavows and has replaced the Board's understanding of the statute's division of responsibilities with a highly unusual jurisdictional scheme. Under the Board's construction, all check-related claims may be raised in a single judicial tribunal—either in federal court, which would have pendent jurisdiction over state claims (including Uniform Commercial Code claims embodying standards established by Regulation CC), or in a state court of competent jurisdiction. The court of appeals' decision, on the other hand, envisions that federal and state courts would adjudicate depositor claims, but that the Board (or other banking agencies with power to "enforce" the Act) would adjudicate inter-bank claims under the EFA Act, while state courts would adjudicate inter-bank state law claims under the Uniform Commercial Code (and "perhaps" claims under the EFA Act). Pet. App. 25. It is unlikely that Congress meant to fragment adjudicative responsibilities in that way.

2. The Seventh Circuit is the first court of appeals to address the question whether federal courts have jurisdiction under the EFA Act respecting inter-bank check collection disputes. There is accordingly no conflict among the courts of appeals on that question of statutory construction. This Court ordinarily does

not grant a petition for a writ of certiorari to address a statutory question of first impression. We nevertheless believe that it would be appropriate for the Court to grant review on the issue presented by this case at this time.

The court of appeals' decision is clearly wrong, and it conflicts in principle with this Court's decision in *Coit*. The decision has the practical consequence of denying litigants the federal judicial forum that Congress expressly provided. That consequence is mitigated to some extent by the language in the court's amended decision, which does not require the Board to establish an administrative tribunal to adjudicate inter-bank claims and leaves open the possibility that those claims could be litigated in state courts. The Seventh Circuit's decision will nevertheless directly impair the availability of the EFA Act's remedies in a major banking center, and it may create needless confusion in the national banking community over the application of the statute. The ultimate effect may be to diminish the effectiveness of the Board's check collection rules. While the Court could await the development of a conflict among the courts of appeals on the question presented here, we do not expect that postponement of a decision on the matter would benefit the Court's consideration of the issue in any significant way.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1995

(5)

No. 94-1175

In The

Supreme Court of the United States

OCTOBER TERM, 1994

BANK ONE, CHICAGO, N.A.,

Petitioner,

v.

MIDWEST BANK & TRUST COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER PURSUANT TO RULE 15.7

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In The

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1175

BANK ONE, CHICAGO, N.A.,

Petitioner,

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER PURSUANT TO RULE 15.7

Petitioner submits this supplemental memorandum in response to the *amicus* brief filed by the Solicitor General.

The Solicitor General recommends that the petition for a writ of certiorari be granted to correct "an implausible construction" of the Expedited Funds Availability Act ("EFA Act"), 12 U.S.C. §§ 4001-4010, "that is likely to impair the statute's remedial objectives." U.S. Br. 7. The government agrees with petitioner that the court of appeals' decision is not only wrong, but "clearly wrong." U.S. Br. 14. As both the government (U.S. Br. 8-9) and petitioner (Pet. 10-11) explain, the court of appeals misread the plain language of the EFA Act. The court of appeals' interpretation of the statute "vest[s] the [Federal Reserve] Board with a highly unusual power" to adjudicate private disputes, contrary to this Court's decision in *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corp.*, 489 U.S. 561 (1989). U.S. Br. 10. In addition, the court of appeals rejected the agency's reasonable interpretation of the EFA Act in favor of a "highly unusual jurisdictional scheme" that fragments adjudication of check-related claims. U.S. Br. 13.

The government's brief underscores the need for immediate review by this Court. The court of appeals' decision has created serious confusion in the interbank check-clearing system, a complex and interdependent system that is essential to the functioning of the national economy. In 1993, the Federal Reserve Bank of Chicago alone processed more than 2.5 billion checks aggregating more than $1.5 trillion.[1] Although the vast majority of these checks are processed without incident, some inevitably give rise to interbank disputes. Indeed, at least one such dispute has already been dismissed as a result of the court of appeals' ruling in this case. See Pet. 6 & n.4. Thus, the question in this case

[1] Federal Reserve Bank of Chicago, 1993 Annual Report, at 17 (reporting data from Illinois, Indiana, Iowa, Michigan, Minnesota, and Wisconsin).

clearly goes "beyond the academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

The court of appeals' decision erroneously denies banks a federal judicial forum for resolution of interbank disputes under the EFA Act, contrary to the clear direction of Congress. Instead, the court of appeals has relegated banks to a non-existent administrative forum. The Federal Reserve has no plans to provide such a forum; indeed, it argues persuasively that it lacks authority to adjudicate interbank disputes. U.S. Br. 11-12.

In sum, immediate review is warranted to correct a clearly erroneous decision that will cause widespread confusion in the national banking system and is likely to impair the objectives of the EFA Act. U.S. Br. 7. This Court's consideration of the straightforward jurisdictional question presented in this case would not be aided by awaiting further development of the issue in the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 94-1175

In The

Supreme Court of the United States

OCTOBER TERM, 1995

BANK ONE, CHICAGO, N.A.,

Petitioner,

v.

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JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED DECEMBER 19, 1994
CERTIORARI GRANTED JUNE 26, 1995

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-3251

First Illinois Bank & Trust v. Midwest Bank & Trust Co.

RELEVANT DOCKET ENTRIES

Date	Description
9/21/93	Private civil case docketed.
9/21/93	Filed Appellant Midwest Bank & Trust jurisdictional statement.
10/19/93	Original record on appeal filed. Contents of record: 1 vol. pleadings; 1 vol. transcripts; 1 exhibits; 2 vol. loose pleadings.
11/3/93	Supplemental record on appeal filed. Contents of record: 1 vol. pleadings.
12/1/93	Filed 15c appellant's brief by Midwest Bank & Trust.
12/1/93	Filed 10c appendix by Appellant Midwest Bank & Trust.
1/28/94	Filed 15c appellee's brief by First Illinois Bank & Trust.
2/14/94	Filed 15c appellant's reply brief by Midwest Bank & Trust.

3/1/94	ORDER: Argument set for Wednesday, April 13, 1994 at 2:00 p.m. in the auxiliary courtroom. Each side limited to 15 minutes.
4/13/94	Case heard and taken under advisement by panel: Circuit Judge Walter J. Cummings, Circuit Judge Frank H. Easterbrook, Circuit Judge Daniel A. Manion.
4/14/94	ORAL ORDER from the bench requesting that the parties file statements regarding jurisdiction by 4/20/94.
4/20/94	Filed Appellant Midwest Bank & Trust jurisdictional memorandum.
4/20/94	Filed Appellee First Illinois Bank & Trust jurisdictional memorandum.
5/3/94	Supplemental record on appeal filed. Contents of record: 2 vol. transcripts.
7/11/94	Filed opinion of the court by Judge Cummings. VACATED & REMANDED with instructions. Cummings, Easterbrook, Manion.
7/11/94	ORDER: Final judgment filed per opinion. With costs: Each party to bear their own costs.
7/19/94	Filed motion by Appellee First Illinois Bank & Trust to extend time to file Petition for Rehearing.
7/26/94	ORDER issued GRANTING motion to extend time to file Petition for Rehearing. Petition for Rehearing due 8/25/94 for First Illinois Bank & Trust.

8/25/94	Filed 25c Petition for Rehearing with Suggestion for Rehearing Enbanc by Appellees First Illinois Bank & Trust.
8/25/94	Filed motion by Standard Bank & Trust Company to file amicus brief.
8/25/94	Filed motion for New York Clearing House Association for leave to file amicus brief.
8/29/94	Filed motion by Board of Governors of the Federal Reserve System to file amicus brief in support of appellee's Petition for Rehearing. 25c amicus brief tendered.
8/29/94	ORDER issued GRANTING motion to file amicus brief. Standard Bank added to case as amicus.
8/29/94	ORDER issued GRANTING motion to file amicus brief. New York Clearing House added to case as amicus.
8/29/94	ORDER issued GRANTING motion to file amicus brief. Board of Governors of the Federal Reserve System added to case as amicus.
9/20/94	ORDER: The opinion of this Court issued on 7/11/94 is corrected as follows: The last paragraph on page 2 is substituted. See order for details.
9/20/94	ORDER: Appellee First Illinois Bank & Trust Petition for Rehearing with Suggestion for Rehearing Enbanc is DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 1:92cv6324

First Illinois Bank & Trust v. Midwest Bank & Trust Co.

RELEVANT DOCKET ENTRIES

Date	No.	Description
9/18/92	1	COMPLAINT; jury demand.
11/5/92	8	MOTION by defendant Midwest Bank & Trust Co. to dismiss plaintiff's action for failure to state a claim.
11/5/92	9	MEMORANDUM by defendant Midwest Bank & Trust Co. in support of defendant's motion to dismiss pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure. [Motion and Memorandum filed in separate volume.]
11/25/92	12	MEMORANDUM OPINION.
11/25/92	13	MINUTE ORDER of 11/25/92 by Hon. Charles P. Kocoras : Enter memorandum opinion that defendant's motion to dismiss plaintiff's action for failure to state a claim is denied.

12/15/92	14	ANSWER by defendant Midwest Bank & Trust Co.
4/22/93	27	AMENDED COMPLAINT.
5/3/93	28	ANSWER TO AMENDED COMPLAINT of First Illinois Bank & Trust by defendant Midwest Bank & Trust Co.
7/8/93	35	STIPULATIONS as to uncontested facts.
7/22/93	37	MOTION by plaintiff First Illinois Bank & Trust for summary judgment.
7/22/93	38	MEMORANDUM by plaintiff First Illinois Bank & Trust in support of motion for summary judgment.
7/22/93	39	CROSS-MOTION by defendant Midwest Bank & Trust Co. for summary judgment.
7/22/93	40	MEMORANDUM by defendant Midwest Bank & Trust Co. in support of cross-motion for summary judgment.
8/5/93	42	REPLY by defendant Midwest Bank & Trust Co. to plaintiff's motion for summary judgment.
8/6/93	43	MEMORANDUM by plaintiff First Illinois Bank & Trust in response to defendant's cross motion for summary judgment.
8/31/93	46	MEMORANDUM ORDER.

8/31/93	47	MINUTE ORDER of 8/31/93 by Hon. Charles P. Kocoras : Ruling held. Enter memorandum opinion: Defendant's motion for summary judgment is denied. Plaintiff's motion for summary judgment is granted in the amount of $43,912.06. Final judgment entered. All other pending motions, if any, are hereby moot.
8/31/93	48	ENTERED JUDGMENT.
9/15/93	49	NOTICE OF APPEAL by defendant Midwest Bank & Trust Co. from order, minute order and judgment entered (PAID $105.00).

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-3251

FIRST ILLINOIS BANK & TRUST,
an Illinois Banking Corporation,
Plaintiff-Appellee,

v.

MIDWEST BANK & TRUST COMPANY,
an Illinois Banking Corporation,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 6324—Charles P. Kocoras, *Judge*

Argued April 13, 1994—Decided July 11, 1994

As Amended on Denial
of Rehearing, September 20, 1994

Before CUMMINGS, EASTERBROOK and MANION, *Circuit Judges*.

CUMMINGS, *Circuit Judge*. In April 1992 plaintiff First Illinois Bank & Trust ("First Illinois") filed an amended complaint against Midwest Bank & Trust Company

("Midwest") complaining that Midwest returned a $64,294.27 check unpaid and negligently failed to advise First Illinois that the check was NSF (Not Sufficient Funds). First Illinois claimed Midwest violated its duty under Regulation CC (12 CFR part 229) to give a reason for returning a check unpaid. 12 CFR §§ 229.30(d), 229.33(b)(8). Pursuant to 12 CFR § 229.38(a), First Illinois sought to recover damages resulting from Midwest's alleged negligence. Subsequently Judge Kocoras granted First Illinois' motion for summary judgment, simultaneously denied summary judgment to Midwest, and entered judgment for First Illinois for $43,912.06, the claimed amount of its loss. The district court found that Midwest had breached the standard of care imposed by Regulation CC by returning the check without advising First Illinois that the check was NSF. Midwest thereafter appealed from the judgment below.

At the April 13, 1994, oral argument in this Court, we questioned whether the district court had jurisdiction over this controversy and ordered both parties to file memoranda concerning that question. We now hold that the district court had no such jurisdiction.

Jurisdiction is supposedly granted under the Expedited Funds Availability Act (12 U.S.C. §§ 4001-4010), in particular by 12 U.S.C. § 4010, titled "Civil liability." Subsection (d) ("Jurisdiction") provides that "any action under this section may be brought in any United States district court...." 12 U.S.C. § 4010(d). But subsection (a) ("Civil liability") limits the application of the section to certain disputes between "any depository institution" and "any person other than another depository institution." 12 U.S.C. § 4010(a). Because the parties concede that both First Illinois and Midwest Bank are "depository institutions" within the meaning of the Expedited Funds Availability Act, 12 U.S.C. § 4001(12), we have no jurisdiction over this dispute.

Disputes such as this, between members of the Federal Reserve System, are to be handled administratively before the Board of Governors of the Federal Reserve System pursuant to 12 U.S.C. § 4009(c)(1) (or perhaps in state court). This conclusion is bolstered by the provisions of 12 U.S.C. § 4010(f), which authorize the Federal Reserve Board to establish liability among "depository institutions" such as these parties. Although the Board of Governors has informed us that no mechanism is currently available for administrative resolution of such disputes, the Board's differing interpretation of this statute cannot confer jurisdiction upon the Court.

The purpose of the Expedited Funds Availability Act is to require banks to make funds available to depositors quickly. Thus the depositors have rights, enforceable in court, while the banks have obligations, which the Federal Reserve Board may establish by regulation and enforce in administrative proceedings.

The judgment below is vacated and the action is remanded to the district court with instructions to dismiss it for want of jurisdiction.

No. 94-1175

In The

Supreme Court of the United States

OCTOBER TERM, 1995

BANK ONE, CHICAGO, N.A.,

Petitioner,

v.

MIDWEST BANK & TRUST COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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August 31, 1995

QUESTION PRESENTED

Whether the subject matter jurisdiction of federal courts under the civil liability provisions of the Expedited Funds Availability Act, 12 U.S.C. § 4010, is limited to disputes between depository institutions and persons other than such institutions, as the court of appeals held, or includes disputes between depository institutions.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioner Bank One, Chicago, N.A. and Respondent Midwest Bank & Trust Company are the only parties to this proceeding. Petitioner formerly was known as First Illinois Bank & Trust.

Petitioner is a wholly-owned subsidiary of Banc One Illinois Corporation, an Illinois corporation. Banc One Illinois Corporation is a wholly-owned subsidiary of Banc One Corporation, an Ohio corporation.

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OCTOBER TERM, 1995

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BANK ONE, CHICAGO, N.A.,

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The amended opinion of the court of appeals (J.A. 7-9) is reported at 30 F.3d 64. The opinions of the district court (Pet. App. 5a-14a, 17a-22a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1994. A petition for rehearing was denied on September 20, 1994. Pet. App. 24a-25a. The petition for a writ of certiorari was filed on December 19, 1994, and granted on June 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 4009 and 4010 of Title 12, United States Code, and sections 229.30 and 229.38 of Title 12, Code of Federal Regulations, are reprinted at App., *infra*, 1a-11a.

STATEMENT

A. The Check Clearing Process, the Expedited Funds Availability Act, and Regulation CC

1. When a customer deposits a check, the customer's bank sends the check to the bank on which the check is drawn for payment. The bank at which the check is deposited is referred to as the "depositary" or "receiving" bank; the bank on which the check is drawn is referred to as the "payor" or "originating" bank. See 12 U.S.C. § 4001(17), (20); U.C.C. § 4-105(2), (3). Because thousands of banks in the United States process billions of checks each year, it is not feasible for each depositary bank to deal directly with each payor bank. Instead, the depositary bank is likely to forward the check through other banks (referred to as "intermediary banks," U.C.C. § 4-105(4)), the check processing facilities of the Federal Reserve System, or a private check clearing house association. When the check is presented to the payor bank,

that bank either pays the check or "dishonors" it by returning the check unpaid to the depositary bank.[1]

Prior to the enactment of the Expedited Funds Availability Act, the check collection process was governed largely by state law, in particular Articles 3 and 4 of the Uniform Commercial Code. The U.C.C. imposes a "midnight deadline," under which a bank has until midnight on the banking day after it receives a check to send the check to the next bank in the process. See U.C.C. §§ 4-104(10), 4-202, 4-301, 4-302. Despite the midnight deadline, the check-clearing process often took days or weeks to complete. As a result, depositary banks often placed lengthy "holds" on deposited funds to protect themselves in the event the payor bank dishonored the check.[2]

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[1] The check clearing process is described in Robert D. Cooter & Edward L. Rubin, *Orders and Incentives as Regulatory Methods: The Expedited Funds Availability Act of 1987*, 35 UCLA L. Rev. 1115, 1121-1122 (1988), and Edward L. Rubin, *Uniformity, Regulation, and the Federalization of State Law: Some Lessons from the Payment System*, 49 Ohio St. L.J. 1251, 1253-56 (1989). See generally Henry J. Bailey & Richard B. Hagedorn, *Brady on Bank Checks: The Law of Bank Checks* (7th ed. 1992 & Supp. 1995); Barkley Clark & Barbara Clark, *The Law of Bank Deposits, Collections and Credit Cards* (rev. ed. 1995); *The Role of the Federal Reserve in Check Clearing and the Nation's Payments System: Joint Hearings Before the House Comm. on Government Operations and the House Comm. on Banking, Finance & Urban Affairs*, 98th Cong., 1st Sess. (1983).

[2] The Federal Reserve Board attempted to speed up the check-clearing process by amending one of its regulations, known as Regulation J, to require the payor bank to notify the depositary bank that it was dishonoring a check by the second banking day following the day on which the payor bank was required to dishonor the check. The amendments to Regulation J applied only to checks for more than $2,500 that were processed by a Federal Reserve Bank. See 50 Fed. Reg. 5,734 (1985); Cooter & Rubin, 35 UCLA L. Rev. 1139.

2. Congress responded to complaints that banks were placing excessively long holds on deposited funds by enacting the Expedited Funds Availability Act ("EFA Act" or "Act") as Title VI of the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 635 (codified at 12 U.S.C. §§ 4001-4010). To expedite the availability of deposited funds, the EFA Act establishes funds availability schedules requiring that certain deposits be made available to depositors on the next business day, and requiring that other deposits be made available within specified time periods, subject to certain exceptions. 12 U.S.C. §§ 4002, 4003. The Act also requires banks to disclose their funds availability policy to customers. *Id.* § 4004. To reduce banks' risk of non-payment, the EFA Act authorizes the Board of Governors of the Federal Reserve System ("Federal Reserve Board" or "Board") to consider improvements to the check-processing system and issue regulations implementing such improvements. *Id.* § 4008. The Act expressly provides that the Board's regulations preempt inconsistent state laws, except certain state laws that impose even shorter funds availability deadlines. *Id.* § 4007.

Five different federal agencies are directed to enforce compliance with the Act and its regulations by exercising their existing authority to regulate different categories of depository institutions. 12 U.S.C. § 4009(a). In addition, the Federal Reserve Board is authorized to enforce the Act to the extent that enforcement is not specifically committed to some other agency. *Id.* § 4009(c).[3]

---

[3] The EFA Act applies to "depository institutions," and Regulation CC defines "bank" broadly to include participants in the payment system, such as thrift institutions and credit unions. See 12 C.F.R. § 229.2(e). For simplicity, this brief generally uses "bank" as a general term for all depository institutions covered by the EFA Act.

Congress provided for civil liability under 12 U.S.C. § 4010. The liability of banks to any person other than a bank is governed by subsection (a); liability among banks is governed by subsection (f). Banks may be held liable to nonbanks for actual damages, plus attorney's fees, costs, and an "additional amount" between $100 and $1,000 (for nonclass action suits). *Id.* § 4010(a)(2)(A). Liability among banks is to be governed by rules promulgated by the Federal Reserve Board, but such liability may not exceed the amount of the check and, in cases of bad faith only, other damages proximately caused by the violation. *Id.* § 4010(f). Congress provided that "[a]ny action under this section" may be brought in federal district court or in any other court of competent jurisdiction. *Id.* § 4010(d).

3. The Board has implemented the EFA Act through Regulation CC, 12 C.F.R. Pt. 229. Subpart C of Regulation CC promulgates rules to expedite the collection and return of checks. In particular, Subpart C imposes a "requirement of expeditious return" on payor banks, 12 C.F.R. § 229.30 (1995); requires payor banks to give depositary banks prompt notice of nonpayment, *id.* § 229.33(a); and specifies that a notice of nonpayment must include the reason for nonpayment, as well as other information, *id.* § 229.33(b)(8).

Section 4010(f) of the statute is implemented by 12 C.F.R. § 229.38, which contains rules governing interbank liability. The rules require banks to "exercise ordinary care and act in good faith in complying with the requirements of [Subpart C]" and provide that banks failing to exercise such care may be held liable to other parties to the check for "the amount of the loss incurred, up to the amount of the check, reduced by the amount of the loss that party would have incurred even if the bank had exercised ordinary care." 12 C.F.R. § 229.38(a). The jurisdictional language in section 4010(d) of the statute is duplicated in 12 C.F.R. § 229.38(g).

B. The Facts in this Case

Petitioner and respondent are banks that use the Federal Reserve Bank of Chicago as a clearing house for collection of checks. On September 25, 1991, one of petitioner's commercial customers deposited to its account with petitioner a check drawn on respondent for $64,294.27. In accordance with its published funds availability policy, petitioner made the deposited funds available to its customer for withdrawal on September 26, one business after the deposit. Pet. App. 6a.

Petitioner forwarded the check for collection through the Federal Reserve System. Respondent received the check on September 26. Respondent returned the check unpaid, stating that the return was for "guarantee of endorsement." Respondent did not determine whether there were sufficient funds in its customer's account to pay the check. On September 26, respondent's customer's account had a balance of $275.31. Pet. App. 6a-7a.

Petitioner received the returned check on Friday, September 27. That same day, petitioner affixed its guarantee of endorsement stamp and resubmitted the check for clearance through the Federal Reserve System. Pet. App. 7a.

Respondent received the resubmitted check on Monday, September 30. On October 1, respondent again refused to pay the check. This time, respondent stated that there were insufficient funds in its customer's account to pay the check. Pet. App. 7a-8a.

By the time petitioner received notice from respondent that there were insufficient funds to pay the check, petitioner's customer had withdrawn $43,916.06 from its account with petitioner, which has not been repaid. Pet. App. 8a. If respondent's first notice of nonpayment had stated that there

were insufficient funds in the account, petitioner would not have suffered any loss. Pet. App. 8a, 13a-14a.

C. The Decisions of the Courts Below

1. Petitioner filed a complaint in district court alleging that respondent had breached its obligations under several provisions of Regulation CC.[4] The district court (N.D. Ill., Kocoras, J.) denied respondent's motion to dismiss the action, and subsequently granted petitioner's motion for summary judgment. Pet. App. 5a-22a.

The district court held that respondent had breached its duty to petitioner under 12 C.F.R. § 229.38(a) by failing to "act according to reasonable banking standards." Pet. App. 10a. The court found that respondent "allowed a check to be returned for the reason that it was missing an endorsement without the bank first knowing that it was NSF [not sufficient funds]," and that this policy "was not utilized by any other bank." Pet. App. 10a. The court further found that, "[b]ecause all other banks would have informed [petitioner] that the . . . check was NSF if that were the case, [petitioner] acted in a reasonably foreseeable manner in assuming that upon receipt of the check the drawer had sufficient funds on account at [respondent] to pay." Pet. App. 11a. The court rejected as "untenable" the position "that the reasons for dishonor can be investigated one at a time and the check

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[4] Petitioner initially filed a complaint in state court alleging that respondent had breached its duties to petitioner under Regulation CC and Illinois law. *First Illinois Bank & Trust v. Midwest Bank & Trust Co.*, No. 92L02538 (Cir. Ct. Cook County, Ill. filed Feb. 28, 1992). The state trial court granted respondent's motion to strike the complaint for failure to satisfy the pleading requirements of Illinois law. Order of July 20, 1992. Rather then filing an amended complaint in state court, petitioner elected to bring an action in district court.

returned in successive stages over a substantial period of time, particularly when the means to determine insufficiency of funds, an important reason for dishonor, is readily available." Pet. App. 12a.

2. The court of appeals (*Cummings*, Easterbrook, and Manion, JJ.) vacated the judgment and remanded the case to the district court with instructions to dismiss for want of jurisdiction. J.A. 7-9. The court of appeals raised the jurisdictional issue *sua sponte* and held that federal courts lack jurisdiction to decide interbank disputes under the EFA Act. The court of appeals recognized that "[s]ubsection (d) [of section 4010] ("Jurisdiction") provides that 'any action under this section [*i.e.*, section 4010] may be brought in any United States district court. . . .'" J.A. 8. But the court concluded that subsection (a) "limits the application of the section to certain disputes between 'any depository institution' and 'any person other than another depository institution.'" J.A. 8. Because petitioner and respondent both are "depository institutions" within the meaning of the EFA Act, the court of appeals held that the federal courts lack subject matter jurisdiction in this case. J.A. 8.

The court of appeals concluded that "[d]isputes such as this, between members of the Federal Reserve System, are to be handled administratively before the Board of Governors of the Federal Reserve System pursuant to 12 U.S.C. § 4009(c)(1)." J.A. 9. In support of this conclusion, the court of appeals cited 12 U.S.C. § 4010(f), which "authorize[s] the Federal Reserve Board to establish liability among 'depository institutions' such as these parties." J.A. 9. The court of appeals concluded that "depositors have rights, enforceable in court, while the banks have obligations, which the Federal Reserve Board may establish by regulation and enforce in administrative proceedings." J.A. 9.

3. Petitioner filed a petition for rehearing and suggestion of rehearing *en banc*, and the Board of Governors of the Federal Reserve System filed a brief *amicus curiae* in support of the petition. The court of appeals denied the petition, but amended its opinion in two respects. First, it added a parenthetical phrase to note that interbank disputes are to be handled administratively "or perhaps in state court." Pet. App. 25a; J.A. 9. Second, the court of appeals deleted a sentence from its opinion stating that petitioner "must make its case before the Board of Governors rather than the federal courts." Pet. App. 2a. In place of the omitted sentence, the court of appeals added the following sentence: "Although the Board of Governors has informed us that no mechanism is currently available for administrative resolution of such disputes, the Board's differing interpretation of this statute cannot confer jurisdiction upon the Court." Pet. App. 25a; J.A. 9.

SUMMARY OF ARGUMENT

1. The text of 12 U.S.C. § 4010 answers the question presented in this case. Subsection (d) provides that "[a]ny action under this section may be brought in any United States district court." Subsection (f), by providing for interbank "liability" up to the amount of the check, as well as "other damages" in certain cases, authorizes interbank actions for violations of liability rules promulgated by the Federal Reserve Board. The ordinary meaning of "damages" is compensation recovered in a court. Moreover, Congress used the identical term "liability" in subsection (a) to refer to liability for damages in a judicial action. Subsection (f) authorizes the Federal Reserve Board to allocate "the risks of loss and liability," not actual losses. Thus, Congress authorized the Board to promulgate liability rules, but did not authorize administrative adjudication of interbank claims for damages.

2. The language of the Conference Report indicates that Congress contemplated actions under subsection (f). In addition, the legislative history confirms that Congress did not intend to authorize the creation of a new administrative enforcement mechanism to adjudicate interbank claims under the EFA Act. *Id.*

3. The court of appeals' decision conflicts with the reasoning of this Court's decision in *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989), which held that a federal regulatory agency lacked authority to adjudicate state law claims. Here, as in *Coit*, Congress legislated against the background of a complex statutory framework in which it has set forth detailed administrative procedures and expressly provided for judicial review. As in *Coit*, Congress did not expressly confer on the agency authority to adjudicate claims, and did not specify procedures or provide for judicial review of such adjudications.

4. The Federal Reserve Board has interpreted section 4010(f) to authorize interbank actions, and has concluded that it lacks authority to adjudicate interbank disputes. That interpretation does not conflict with the plain language of the statute, and therefore qualifies for deference under the doctrine of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

5. Federal district courts also have general federal-question jurisdiction under 28 U.S.C. § 1331 to decide interbank claims arising under section 4010 and its implementing regulations. Subsection (f) plainly creates a federal cause of action for violations of interbank liability rules promulgated by the Federal Reserve Board in Regulation CC.

6. Under the Federal Reserve Board's interpretation, federal and state courts have concurrent jurisdiction to decide all check-related claims arising out of a single set of facts. In contrast, the court of appeals' interpretation fragments jurisdiction by assigning interbank claims to an administrative tribunal and other check-related claims to the courts. The court of appeals' interpretation also creates inter-agency jurisdictional problems among the five federal agencies that share responsibility for enforcing the EFA Act.

ARGUMENT

I. THE TEXT OF SECTION 4010 PROVIDES THAT FEDERAL COURTS HAVE JURISDICTION OVER INTERBANK DISPUTES UNDER THE EFA ACT AND REGULATION CC.

In a statutory construction case, analysis begins with the language of the statute. *Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct. 2144, 2147 (1995). The text of 12 U.S.C. § 4010 answers the question presented in this case. Subsection (d) of section 4010 provides:

> **(d) Jurisdiction**
>
> Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year after the date of the occurrence of the violation involved.

The language of subsection (d) could not be clearer: *Any* action under section 4010 may be brought in a United States district court. If section 4010 authorizes interbank actions for violations of the EFA Act or regulations promulgated under

the Act, then federal district courts plainly have jurisdiction to decide such actions.[5]

The court of appeals focused on subsection (a) of section 4010, which provides that depository institutions are liable to "any person other than another depository institution" for "fail[ure] to comply with any requirement imposed under [the EFA Act] or any regulation prescribed under [the Act]." The court of appeals concluded that, because a bank cannot bring an action against another bank under subsection (a), it cannot do so under section 4010. J.A. 8. The jurisdiction-conferring language of subsection (d) is not confined to actions under subsection (a); instead, subsection (d) provides that "any action under this *section*" may be brought in district court. (Emphasis added.) A different subsection of section 4010 — subsection (f) — authorizes interbank actions.

Section 4010(f) provides:

> **(f) Authority to establish rules regarding losses and liability among depository institutions**
>
> The Board is authorized to impose on or allocate among depository institutions the risks of loss and liability in connection with any aspect of the payment system, including the receipt, payment, collection or clearing of checks, and any related function of the payment system with respect to checks. Liability under this subsection shall not exceed the amount of the check giving rise to the loss or liability, and, where there is bad faith, other damages, if any, suffered as a proximate consequence of any act or omission giving rise to the loss or liability.

[5] "[I]n its usual legal sense," an "action" is "a lawsuit brought in a court." Black's Law Dictionary 28 (6th ed. 1990). See *Melkonyan v. Sullivan*, 501 U.S. 89, 94-95 (1991) ("action" refers to proceedings in a court); see generally *Reno v. Koray*, 115 S. Ct. 2021, 2025 (1995) ("meaning of a word . . . must be drawn from the context in which it is used").

Subsection (f) speaks the language of actions in a court of law. First, it authorizes liability for "damages." The ordinary meaning of "damages" is "a pecuniary compensation or indemnity, which may be recovered *in the courts* by any person who has suffered loss, detriment, or injury, . . . through the unlawful act or omission or negligence of another." Black's Law Dictionary 389 (6th ed. 1990) (emphasis added). Second, subsection (f) provides for "liability under this subsection." The term "liability," when used in conjunction with "damages," refers to "[l]iability for an amount to be ascertained by trial of the facts in particular cases." Black's Law Dictionary 914. Indeed, Congress used the identical term "liability" in subsection (a) to refer to the obligation to pay damages imposed by a court of law. It is a "basic canon of statutory construction that identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992); see also *Gustafson v. Alloyd Co., Inc.*, 115 S. Ct. 1061, 1067 (1995). Third, subsection (f) employs the concepts of bad faith and proximate causation, both of which are staples of private judicial actions.

The language of subsection (f) does not confer on the Federal Reserve Board authority to adjudicate interbank claims for damages. The Board is authorized to "impose on or allocate among depository institutions the *risks* of loss and liability." 12 U.S.C. § 4010(f) (emphasis added). The word "risk" is forward-looking; it means a "possibility of loss." *Webster's Third New International Dictionary* 1961 (1993). In authorizing the Board to allocate "the risks of loss and liability," Congress could not have contemplated that the

Board would be engaging in adjudication, because adjudication allocates actual losses, not possible losses. Instead of adjudication, the text of section 4010(f) indicates that Congress contemplated rulemaking, which is prospective in nature and therefore would allow the Board to allocate the risks of losses and liabilities yet to be incurred. This conclusion is confirmed by the title of subsection (f), which describes subsection (f) as conferring "[a]uthority to establish *rules* regarding losses and liability among depository institutions." (Emphasis added.) See *INS v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) (proper to consider title of a statute or section to resolve any ambiguity in the statutory text).

The statutory structure provides additional support for the conclusion that section 4010 authorizes interbank actions for violations of the Act and Regulation CC. First, subsections (a) and (f) of section 4010 parallel and complement each other in important respects. Both subsections create liability for damages and place limits on the amount of damages that may be recovered. Subsection (a) governs the liability of a depository institution to "any person other than another depository institution." Subsection (f) governs liability among depository institutions, and places stricter limitations on damages in cases of interbank liability.[6] Together, Subsections (a) and (f) provide for liability for damages for all violations of the Act and its regulations. In addition, subsections (c) and (d) refer to "any action brought under this

[6] Compare 12 U.S.C. § 4010(a) (providing for actual damages, attorney's fees, costs, and additional damages of between $100 and $1,000 in individual actions, and up to $500,000 or 1% of the net worth of the bank in class actions) with 12 U.S.C. § 4010(f) (providing that liability generally "shall not exceed the amount of the check," and even in cases of bad faith shall not exceed actual damages proximately caused by the violation).

section." If Congress had intended to authorize actions only under subsection (a), it would have been much clearer to refer to actions brought under subsection (a).

In sum, the statutory text leaves no doubt that a bank may bring an action against another bank for a violation of the EFA Act or Regulation CC, and that such an action may be brought in a federal court.

II. THE LEGISLATIVE HISTORY SUPPORTS THE CONCLUSION THAT FEDERAL COURTS HAVE JURISDICTION OVER INTERBANK DISPUTES.

"[W]hen a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); see also *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). The text of Section 4010 provides a clear answer to the question in this case, and therefore the Court need not consider the legislative history of the EFA Act. In any event, the legislative history reinforces the meaning of the statutory text.

Subsection (f) was added to section 4010 by the Conference Committee. The Conference Report states that subsection (f) "does not limit causes of action brought by accountholders or the amount of damages recoverable by accountholders under any *other* action." H.R. Conf. Rep. No. 261, 100th Cong., 1st Sess. 183 (1987) (emphasis added). This statement indicates that the conferees regarded a proceeding under subsection (f) as an "action."

As initially passed by the House and Senate, the language of subsection (a) was broad enough to authorize interbank actions. The House version of subsection (a) provided:

> Except as otherwise provided in this section, any depository institution which fails to comply with any requirement imposed under this Act or any regulation prescribed under this Act with respect to *any person* is liable to such person . . . .

H.R. 28, 100th Cong., 1st Sess. § 14(a) (1987) (emphasis added). Similarly, the Senate version of subsection (a) provided:

> Except as otherwise provided in this section, any depository institution which fails to comply with any requirement imposed under section 603, 604, 605, 606, or 607 with respect to *any person* is liable to such person . . . .

S. 790, 100th Cong., 1st Sess. § 609(a) (1987) (emphasis added). When the Conference Committee modified subsection (a) to exclude interbank actions and added a new subsection (f), it gave no indication that it intended interbank liability to be adjudicated in a different forum. Instead, subsection (f) imposes different limitations on damages in interbank disputes, and authorizes the Federal Reserve Board to establish interbank liability rules. If Congress had intended to do more than this — for example, to move interbank disputes from courts to a new (and hitherto nonexistent) administrative tribunal — it almost certainly would have given some indication of such an intent.

Finally, the Conference Report states that § 4009 "requires the Federal banking regulators to use *existing* administrative enforcement mechanisms to enforce compliance with" the EFA Act. H.R. Conf. Rep. No. 261, at 183 (emphasis added). As explained below, see *infra* pp. 18-19, existing administrative enforcement mechanisms do not include a mechanism for adjudicating interbank claims for

damages. Consequently, the court of appeals erred in concluding that interbank disputes "are to be handled administratively before the Board of Governors of the Federal Reserve System pursuant to 12 U.S.C. § 4009(c)(1) . . . ." J.A. 9.

III. THE COURT OF APPEALS' INTERPRETATION CONFLICTS WITH THIS COURT'S REASONING IN *COIT v. FSLIC*.

The court of appeals concluded that the Federal Reserve Board has authority to adjudicate interbank claims for damages arising under the EFA Act and Regulation CC. J.A. 9. That conclusion conflicts with the reasoning of this Court's decision in *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989). In *Coit*, the Court held that the Federal Savings and Loan Insurance Corporation lacked authority to adjudicate state law claims asserted against insolvent thrift institutions. In reaching that conclusion, the Court relied on the absence of a clear statement by Congress that it intended to authorize an administrative agency to adjudicate private claims:

> The statutory framework in which [12 U.S.C.] § 1729 appears indicates clearly that when Congress meant to confer adjudicatory authority on FSLIC it did so explicitly and set forth the relevant procedures in considerable detail. For example, in its role as supervisor of ongoing thrift institutions, FSLIC together with the Bank Board is empowered to adjudicate violations of federal law, to issue cease-and-desist orders, to remove officers and directors, and to impose civil sanctions. See 12 U.S.C. §§ 1464(d), 1730. The statutory provisions that confer this authority set forth with precision the agency procedures to be followed and the remedies available, with explicit reference to judicial review

> under the Administrative Procedure Act. See 12 U.S.C. §§ 1464(d)(7)(A), 1730(j)(2). It is thus reasonable to infer that if Congress intended to confer adjudicatory authority upon FSLIC in its receivership capacity, it would have enacted similar provisions governing procedural and substantive rights and providing for judicial review.

Coit, 489 U.S. at 573-74.

The Court's reasoning in *Coit* is fully applicable to this case. Here, as in *Coit*, the statutory provision at issue does not explicitly confer adjudicatory authority on the agency, does not specify any procedures for administrative adjudications (let alone specify such procedures "in considerable detail," 489 U.S. at 574), and does not mention judicial review of administrative adjudications. As in *Coit*, the statutory context demonstrates that when Congress meant to confer adjudicatory authority on the agency it did so explicitly. Section 4009 provides that compliance shall be enforced under section 8 of the Federal Deposit Insurance Act, 12 U.S.C. § 1818 (for most depository institutions), or the Federal Credit Union Act, 12 U.S.C. § 1751 *et seq.* (for certain credit unions). Section 1818 of Title 12 sets forth agency procedures and remedies with a level of precision comparable to that of the regulatory provisions considered by the Court in *Coit*. See, *e.g.*, 12 U.S.C. § 1818(b) (notice and hearing requirements); 12 U.S.C. § 1818(h) (providing for judicial review under the APA).

Although the FSLIC had enforcement authority similar to that of the Federal Reserve Board under Section 4009, this Court in *Coit* did not regard that authority as extending to adjudication of private claims. See 489 U.S. at 574. The same is true here. The enforcement provisions of the EFA Act authorize banking agencies to use traditional enforcement

mechanisms such as cease-and-desist orders; they do not authorize administrative adjudication of private claims for damages. The closest 12 U.S.C. § 1818 comes to authorizing an administrative award of "damages" is a provision authorizing the agency to require "restitution," "reimbursement," or "indemnification" in cases involving unjust enrichment or reckless disregard for the law. 12 U.S.C. § 1818(b)(6)(A). Subsection 4010(f) does not require a showing of unjust enrichment or reckless disregard for the law as a prerequisite for recovering damages, and restitution and damages are different remedies. See 1 Dan B. Dobbs, *Law of Remedies* § 1.1, at 5 (2d ed. 1993) ("restitution is measured by the defendant's gains, not by the plaintiff's losses").

In addition, enforcement proceedings under 12 U.S.C. § 1818 are initiated by the agency, not by private parties. Although a bank can ask the agency to take enforcement action, the decision whether to initiate such an enforcement action is within the agency's discretion, and is not subject to judicial review. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Consequently, a bank's ability to recover damages under the court of appeals' interpretation of section 4010(f) often would depend on a variety of factors unrelated to the merits of its claim, including the resources available to the agency and its enforcement priorities. Thus, the court of appeals' decision would not merely change the forum in which interbank claims would be adjudicated; it would deprive banks of the ability to pursue such claims altogether as a matter of right, permitting them to proceed only at the discretion of the regulatory agency.

IV. THE FEDERAL RESERVE BOARD'S CONCLUSION THAT IT LACKS AUTHORITY TO ADJUDICATE INTERBANK DISPUTES IS ENTITLED TO DEFERENCE.

When the intent of Congress is clear, that is "the end of the matter." *NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995), quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Even if Section 4010 were ambiguous, however, the Federal Board's interpretation of the statute would be entitled to deference. See *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417 (1992) (court will defer to agency's construction, so long as that interpretation does not conflict with the plain language of the statute; *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 292 (1988) (same).

The Federal Reserve Board, the agency responsible for implementing the EFA Act, has construed section 4010 not to confer on the Board any authority to adjudicate interbank claims under the EFA Act or Regulation CC. See 12 C.F.R. § 229.38(g). That interpretation does not conflict with the plain language of the statute; indeed, it is strongly supported by the statutory text. Accordingly, the Board's interpretation of section 4010 is entitled to judicial deference under the *Chevron* doctrine. See *Reiter v. Cooper*, 113 S. Ct. 1213, 1221 (1993) (agency's view that it had no initial jurisdiction with respect to an award of reparations was "a reasonable interpretation of the statute, and hence a binding one"); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844-46 (1986) (agency's interpretation of federal statute as conferring jurisdiction on the agency to adjudicate state law counterclaims was entitled to deference).

V. FEDERAL COURTS HAVE JURISDICTION UNDER 28 U.S.C. § 1331 TO DECIDE INTERBANK CLAIMS ARISING UNDER THE EFA ACT AND REGULATION CC.

Apart from the specific statutory grant of jurisdiction in 12 U.S.C. § 4010(d), federal courts have general federal-question jurisdiction under 28 U.S.C. § 1331 to decide interbank claims arising under Section 4010 and Regulation CC.

Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." It is well settled that an action "arises under" federal law for purposes of section 1331 if "federal law creates the cause of action." *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 808 (1986). See *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). In some circumstances, moreover, an action may arise under federal law even though state law provides the cause of action. See *Merrell Dow*, 478 U.S. at 808-810. In this case, the Court need not address the sometimes difficult questions posed by "the presence of a federal issue in a state-created cause of action," *Merrell Dow*, 478 U.S. at 810, because subsection (f) and its implementing regulations plainly create a federal cause of action.

An action "arises under" federal law for purposes of section 1331 if it arises under "an Act of Congress or an administrative regulation or executive order made pursuant to an Act of Congress." 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3563, at 51 (2d ed. 1984 & 1995 Supp.) (citing authorities). Subsection (f) creates an interbank cause of action by providing for "[l]iability under this subsection" in "the amount of the check giving rise to the loss or liability," as well as

"other damages" in certain cases. 12 U.S.C. § 4010(f). Pursuant to subsection (f), the Federal Reserve Board has promulgated regulations establishing interbank liability rules and providing that a bank may bring an action for damages against other banks that violate the rules. See 12 C.F.R. § 229.38. Accordingly, interbank actions under subsection 4010(f) and Regulation CC arise under federal law, and 28 U.S.C. § 1331 provides an additional basis for federal jurisdiction.

VI. POLICY CONSIDERATIONS SUPPORT THE CONCLUSION THAT FEDERAL COURTS HAVE JURISDICTION OVER INTERBANK DISPUTES.

Federal policy generally favors adjudication of an entire controversy in a single forum. See, *e.g.*, *CFTC v. Schor*, 478 U.S. at 843-44 (bifurcation of claims between commodities brokers and their customers would preclude efficient remedies); *Alexander v. Hillman*, 296 U.S. 222, 241-43 (1935) (district courts in receivership actions may determine counterclaims in order to provide "complete relief"); Fed. R. Civ. P. 13(a) (requiring the assertion of counterclaims arising out of the "transaction or occurrence that is the subject matter of the opposing party's claim"). Under the Federal Reserve Board's interpretation of section 4010, federal courts and state courts have concurrent jurisdiction to decide all check-related claims arising out of a single transaction. Federal courts have jurisdiction to decide state-law claims arising out of a "common nucleus of operative fact," even in non-diversity cases, under the doctrine of pendent jurisdiction. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

In contrast, the court of appeals' interpretation of section 4010 fragments jurisdiction to decide check-related claims. The court of appeals' interpretation makes it impossible to

resolve depositor claims and interbank claims in a single proceeding, even though both types of claims may arise out of a single set of facts. In addition, the court of appeals' interpretation may well require interbank claims under state law to be filed in a state court, while interbank claims under federal law must be decided by a federal agency.[7] Thus, the court of appeals' decision is likely to result in inefficient piecemeal litigation of check-related claims.

Finally, the court of appeals' interpretation gives rise to inter-agency jurisdictional questions. The EFA Act confers enforcement authority on five different federal agencies.[8] If a depository institution regulated by one agency asserted a claim against an institution regulated by a different agency, it is unclear which agency would have authority to adjudicate the claim. Congress is unlikely to have intended to create such a jurisdictional muddle.

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[7] The Court has recognized that "wholesale importation of concepts of pendent or ancillary jurisdiction into the agency context" would raise "constitutional difficulties." *CFTC v. Schor*, 478 U.S. at 852.

[8] See 12 U.S.C. § 4009(a) (conferring authority to enforce EFA Act on the Comptroller of the Currency (as to national banks), the Federal Reserve Board (as to member banks of the Federal Reserve System other than national banks); the Federal Deposit Insurance Corporation (as to banks insured by the FDIC other than members of the Federal Reserve System), the Director of the Office of Thrift Supervision (for savings associations insured by the FDIC), and the National Credit Union Administration Board (for federal credit unions and insured credit unions)).

CONCLUSION

The judgment of the court of appeals should be reversed.

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APPENDIX

1. Section 4009 of Title 12, United States Code, provides:

§ 4009. Administrative enforcement

(a) Administrative enforcement

Compliance with the requirements imposed under this chapter, including regulations prescribed by and orders issued by the Board of Governors of the Federal Reserve System under this chapter, shall be enforced under—

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1818] in the case of—

(A) national banks, by the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) section 8 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1818], by the Director of the Office of Thrift Supervision in the case of savings associations the deposits of which are insured by the Federal Deposit Insurance Corporation; and

(3) the Federal Credit Union Act [12 U.S.C.A. § 1751 *et seq.*], by the National Credit Union Administration Board with respect to any Federal credit union or insured credit union.

(b) Additional powers

(1) Violation of this chapter treated as violation of other Acts

For purposes of the exercise by any agency referred to in subsection (a) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this chapter shall be deemed to be a violation of a requirement imposed under that Act.

(2) Enforcement authority under other Acts

In addition to its powers under any provision of law specifically referred to in subsection (a) of this section, each of the agencies referred to in such subsection may exercise, for purposes of enforcing compliance with any requirement imposed under this chapter, any other authority conferred on it by law.

(c) Enforcement by Board

(1) In general

Except to the extent that enforcement of the requirements imposed under this chapter is specifically committed to some other Government agency under subsection (a) of this section, the Board of Governors of the Federal Reserve System shall enforce such requirements.

(2) Additional remedy

If the Board determines that

(A) any depository institution which is not a depository institution described in subsection (a) of this section, or

(B) any other person subject to the authority of the Board under this chapter including any person subject to the authority of the Board under section 4004(d)(2) or 4008(c) of this title,

has failed to comply with any requirement imposed by this chapter or by the Board under

this chapter, the Board may issue an order prohibiting any depository institution, any Federal Reserve bank, or any other person subject to the authority of the Board from engaging in any activity or transaction which directly or indirectly involves such noncomplying depository institution or person (including any activity or transaction involving the receipt, payment, collection, and clearing of checks and any related function of the payment system with respect to checks).

(d) Procedural rules

The authority of the Board to prescribe regulations under this chapter does not impair the authority of any other agency designated in this section to make rules regarding its own procedures in enforcing compliance with requirements imposed under this chapter.

2. Section 4010 of Title 12, United States Code, provides:

§ 4010. Civil liability

(a) Civil liability

Except as otherwise provided in this section, any depository institution which fails to comply with any requirement imposed under this chapter or any regulation prescribed under this chapter with respect to any person other than another depository institution is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2)(A) in the case of an individual action, such additional amount as the court may allow, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

(B) in the case of a class action, such amount as the court may allow, except that—

(i) as to each member of the class, no minimum recovery shall be applicable; and

(ii) the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same depository institution shall not be more than the lesser of $500,000 or 1 percent of the net worth of the depository institution involved; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

(b) Class action awards

In determining the amount of any award in any class action, the court shall consider, among other relevant factors—

(1) the amount of any actual damages awarded;

(2) the frequency and persistence of failures of compliance;

(3) the resources of the depository institution;

(4) the number of persons adversely affected; and

(5) the extent to which the failure of compliance was intentional.

(c) Bona fide errors

(1) General rule

A depository institution may not be held liable in any action brought under this section for a violation of this chapter if the depository institution demonstrates by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of

procedures reasonably adapted to avoid any such error.

(2) Examples

Examples of a bona fide error include clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a depository institution's obligation under this chapter is not a bona fide error.

(d) Jurisdiction

Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year after the date of the occurrence of the violation involved.

(e) Reliance on Board rulings

No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board of Governors of the Federal Reserve System, notwithstanding the fact that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(f) Authority to establish rules regarding losses and liability among depository institutions

The Board is authorized to impose on or allocate among depository institutions the risks of loss and liability in connection with any aspect of the payment system, including the receipt, payment, collection, or clearing of checks, and any related function of the payment system with respect to checks. Liability under this subsection shall not exceed the amount of the check giving rise to the loss or liability, and, where there is bad faith, other damages, if any, suffered as a proximate consequence of any act or omission giving rise to the loss or liability.

3. Section 229.30 of Title 12, Code of Federal Regulations, provides:

§ 229.30 Paying bank's responsibility for return of checks

(a) *Return of checks.* If a paying bank determines not to pay a check, it shall return the check in an expeditious manner as provided in either paragraph (a)(1) or (a)(2) of this section.

(1) *Two-day/four-day test.* A paying bank returns a check in an expeditious manner if it sends the returned check in a manner such that the check would normally be received by the depositary bank not later than 4:00 p.m. (local time of the depositary bank) of—

(i) The second business day following the banking day on which the check was presented to the paying bank, if the paying bank is located in the same check processing region as the depositary bank; or

(ii) The fourth business day following the banking day on which the check was presented to the paying bank, if the paying bank is not located in the same check processing region as the depositary bank.

If the last business day on which the paying bank may deliver a returned check to the depositary bank is not a banking day for the depositary bank, the paying bank meets the two-day/four-day test if the returned check is received by the depositary bank on or before the depositary bank's next banking day.

(2) *Forward collection test.* A paying bank also returns a check in an expeditious manner if it sends the returned check in a manner that a similarly situated bank would normally handle a check—

(i) Of similar amount as the returned check;

(ii) Drawn on the depositary bank; and

(iii) Deposited for forward collection in the similarly situated bank by noon on the banking day following the banking day on which the check was presented to the paying bank.

Subject to the requirement for expeditious return, a paying bank may send a returned check to the depositary bank, or to any other bank agreeing to handle the returned check expeditiously under § 229.31(a). A paying bank may convert a check to a qualified returned check. A qualified returned check must be encoded in magnetic ink with the routing number of the depositary bank, the amount of the returned check, and a "2" in position 44 of the MICR line as a return identifier, in accordance with the American National Standard Specifications for Placement and Location of MICR Printing, X9.13 (Sept. 1983). This paragraph does not affect a paying bank's responsibility to return a check within the deadlines required by the U.C.C. Regulation J (12 CFR part 210), or § 229.30(c).

(b) *Unidentifiable depository bank.* A paying bank that is unable to identify the depositary bank with respect to a check may send the returned check to any bank that handled the check for forward collection even if that bank does not agree to handle the check expeditiously under § 229.31(a). A paying bank sending a returned check under this paragraph to a bank that handled the check for forward collection must advise the bank to which the check is sent that the paying bank is unable to identify the depositary bank. The expeditious return requirements in § 229.30(a) do not apply to the paying bank's return of a check under this paragraph.

(c) *Extension of deadline.* The deadline for return or notice of nonpayment under the U.C.C., Regulation J (12 CFR part 210), or § 229.36(f)(2) of this part is extended:

(1) If a paying bank, in an effort to expedite delivery of a returned check to a bank, uses a means of delivery that would ordinarily result in the returned check being received by the bank to which it is sent on or before the receiving bank's next banking day following the otherwise applicable deadline; this deadline is extended further if a paying bank uses a highly expeditious means of transportation, even if this means of transportation would ordinarily result in delivery after the receiving bank's next banking day; or

(2) If the deadline falls on a Saturday that is a banking day, as defined in the applicable UCC, for the paying bank, and the paying bank uses a means of delivery that would ordinarily result in the returned check being received by the bank to which it is sent prior to the cut-off hour for the next processing cycle, in the case of a returning bank, or on the next banking day, in the case of a depositary bank, after midnight Saturday night.

(d) *Identification of returned check.* A paying bank returning a check shall clearly indicate on the face of the check that it is a returned check and the reason for return.

(e) *Depositary bank without accounts.* The expeditious return requirements of paragraph (a) of this section do not apply to checks deposited in a depositary bank that does not maintain accounts.

(f) *Notice in lieu of return.* If a check is unavailable for return, the paying bank may send in its place a copy of the front and back of the returned check, or, if no such copy is available, a written notice of nonpayment containing the information specified in § 229.33(b). The copy or notice shall clearly state that it constitutes a notice in lieu of return. A notice in lieu of return is considered a returned check subject to the expeditious return requirements of this section and to the other requirements of this subpart.

(g) *Reliance on routing number.* A paying bank may return a returned check based on any routing number designating the depositary bank appearing on the returned check in the depositary bank's indorsement.

4. Section 229.38 of Title 12, Code of Federal Regulations, provides:

§ 229.38 Liability.

(a) *Standard of care; liability; measure of damages.* A bank shall exercise ordinary care and act in good faith in complying with the requirements of this subpart. A bank that fails to exercise ordinary care or act in good faith under this subpart may be liable to the depositary bank, the depositary bank's customer, the owner of a check, or another party to the check. The measure of damages for failure to exercise ordinary care is the amount of the loss incurred, up to the amount of the check, reduced by the amount of the loss that party would have incurred even if the bank had exercised ordinary care. A bank that fails to act in good faith under this subpart may be liable for other damages, if any, suffered by the party as a proximate consequence. Subject to a bank's duty to exercise ordinary care or act in good faith in choosing the means of return or notice of nonpayment, the bank is not liable for the insolvency, neglect, misconduct, mistake, or default of another bank or person, or for loss or destruction of a check or notice of nonpayment in transit or in the possession of others. This section does not affect a paying bank's liability to its customer under the U.C.C. or other law.

(b) *Paying bank's failure to make timely return.* If a paying bank fails both to comply with § 229.30(a) and to comply with the deadline for return under the U.C.C., Regulation J (12 CFR part 210), or § 229.30(c) in connection with a single nonpayment of a check, the

paying bank shall be liable under either § 229.30(a) or such other provision, but not both.

(c) *Comparative negligence.* If a person, including a bank, fails to exercise ordinary care or act in good faith under this subpart in indorsing a check (§ 229.35), accepting a returned check or notice of nonpayment (§§ 229.32(a) and 229.33(c)), or otherwise, the damages incurred by that person under § 229.38(a) shall be diminished in proportion to the amount of negligence or bad faith attributable to that person.

(d) *Responsibility for certain aspects of checks*—(1) A paying bank, or in the case of a check payable through the paying bank and payable by another bank, the bank by which the check is payable, is responsible for damages under paragraph (a) of this section to the extent that the condition of the check when issued by it or its customer adversely affects the ability of a bank to indorse the check legibly in accordance with § 229.35. A depositary bank is responsible for damages under paragraph (a) of this section to the extent that the condition of the back of a check arising after the issuance of the check and prior to acceptance of the check by it adversely affects the ability of a bank to indorse the check legibly in accordance with § 229.35. Responsibility under this paragraph shall be treated as negligence of the paying or depositary bank for purposes of paragraph (c) of this section.

(2) *Responsibility for payable through checks.* In the case of a check that is payable by a bank and payable through a paying bank located in a different check processing region than the bank by which the check is payable, the bank by which the check is payable is responsible for damages under paragraph (a) of this section, to the extent that the check is not returned to the depositary bank through the payable through bank as quickly as the check would have been required to be

returned under § 229.30(a) had the bank by which the check is payable—

(i) Received the check as paying bank on the day the payable through bank received the check; and

(ii) Returned the check as paying bank in accordance with § 229.30(a)(1).

Responsibility under this paragraph shall be treated as negligence of the bank by which the check is payable for purposes of paragraph (c) of this section.

(e) *Timeliness of action.* If a bank is delayed in acting beyond the time limits set forth in this subpart because of interruption of communication or computer facilities, suspension of payments by a bank, war, emergency conditions, failure of equipment, or other circumstances beyond its control, its time for acting is extended for the time necessary to complete the action, if it exercises such diligence as the circumstances require.

(f) *Exclusion.* Section 229.21 of this part and section 611(a), (b), and (c) of the Act (12 U.S.C. 4010(a), (b), and (c)) do not apply to this subpart.

(g) *Jurisdiction.* Any action under this subpart may be brought in any United States district court, or in any other court of competent jurisdiction, and shall be brought within one year after the date of the occurrence of the violation involved.

(h) *Reliance on Board rulings.* No provision of this subpart imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board, regardless of whether the rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason after the act or omission has occurred.

[illegible]

[illegible] the United States

[illegible]

BANK ONE, CHICAGO, N.A.,

Petitioner,

v.

MIDWEST BANK & TRUST COMPANY,

Respondent.

[illegible] CERTIORARI
[illegible] COURT OF APPEALS
[illegible] CIRCUIT

BRIEF FOR THE RESPONDENT

[illegible]

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[illegible] 1995

[illegible]

QUESTION PRESENTED

Whether section 611 of the Expedited Funds Availability Act (12 U.S.C. § 4010) grants the Federal District Court subject matter jurisdiction over a check collection dispute between two Illinois banking corporations?

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT[1]

Petitioner, Bank One, Chicago, N.A. and respondent, Midwest Bank & Trust Company are the only parties to this proceeding. Both petitioner and respondent are Illinois banking corporations. Petitioner formerly was known as First Illinois Bank & Trust.

Respondent is a wholly owned subsidiary of First Midwest Corporation, a Delaware Corporation.

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[1] Respondent did not "consent" to the filing of *amicus curiae* briefs by the New York Clearing House Association and the Electronic Check Clearing House Organization. In both instances respondent asked what question of law or fact the brief would present that was relevant to the disposition of this case and would not be presented by petitioner or the Solicitor General. In neither instance did it appear that the filing of such a brief would be favored under Rule 37.1 of this Court.

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STATEMENT

A. The Check Clearing Process, the Uniform Commercial Code, and the Expedited Funds Availability Act.

When a customer deposits a check in a bank, that bank sends the check for payment by the bank on which the check is drawn. The bank at which the check is deposited is referred to as the "depository" or "receiving" bank, and the bank on which the check is drawn is referred to as the "payor" or "originating" bank. See 810 ILCS 5/4-105(2) and (3); 12 U.S.C. § 4001(17) and (20). Often the depository bank forwards the check for collection through the Federal Reserve System, an intermediary bank, or a private check clearing house association. When the check is presented to the payor bank, that bank either pays the check or returns the checks unpaid to the depository bank.

Prior to the enactment of the Expedited Funds Availability Act, check collection disputes such as the present case were decided under state law. More particularly, they were governed by Articles 3 and 4 of the Uniform Commercial Code ("UCC"). Federal regulations regarding the check collection process existed such as Regulation J (12 C.F.R. Pt. 210), but those federal regulations did not create a federal cause of action. Under the express terms of Section 4-103(a) and (b) of the UCC (810 ILCS 5/4-103(a) and (b)), those federal regulations are

incorporated into the UCC and become enforceable as a matter of state law.[2]

In 1987 Congress enacted the Expedited Funds Availability Act ("EFA Act") in response to complaints by banking customers that banks were placing unreasonably long holds on deposited funds. That Act is Title VI of the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 635, and is codified at 12 U.S.C. §§ 4001-4010.

Section 611 of the EFA Act (12 U.S.C. § 4010) concerns civil liability. The focus of the case at bar concerns whether this section confers federal jurisdiction over interbank disputes.[3] Respondent disagrees with petitioner's characterization of the subsections in section 611 of the Act. Respondent's position regarding these statutory provisions is set forth in the Argument section of this brief.

The EFA Act authorizes the Board of Governors of the Federal Reserve System ("Federal Reserve Board" or "Board") to prescribe regulations. The Board has prescribed regulation CC (12 C.F.R. Pt. 229).

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[2] *See, e.g., United Postal Savings Association v. Royal Bank Mid-County*, 784 S.W. 2d 906 (Mo. Ct. App. 1990) where the Court applied 12 C.F.R. through UCC § 4-103 *Id.* 784 S.W. 2d at 908 n.4.

[3] The EFA Act uses the terms "depository institutions." Like petitioner, respondent sometimes uses the term "bank" as synonymous with the EFA's term "depository institutions".

B. The Facts In This Case

Petitioner and respondent are both Illinois banks that use the Federal Reserve Bank of Chicago as their clearing house for collection of checks. (Stip. ¶¶ 1-3).[4] On September 25, 1991, one of petitioner's customers deposited $77,371.84 in its account. Included in that amount was a check drawn on respondent in the amount of $64,294.27. (Stip. ¶ 30). At the close of business on September 25, 1991, the account of petitioner's customer showed a balance of $78,598.14 of which $1,377.30 represented collected funds and $77,262.84 represented uncollected funds. (Stip. ¶ 34).

The check at issue was received by respondent on September 26, 1991. The endorsement did not meet respondent's standards and petitioner's proof stamp (endorsement) on the check was so faint it was illegible. (Stip. ¶¶ 14, 15).

Because respondent first received the check on Thursday, September 26, 1991, under 12 C.F.R. 229.33 respondent had until 4:00 p.m. on Monday, September 30, 1991 to notify the forwarding bank that it had determined not to pay the check. During the period September 26, 1991 through September 30, 1991, petitioner allowed $55,577.90 to be paid out or withdrawn against uncollected funds. $42,651.33 of that amount was never collected. (See Stip. ¶¶ 33-36). This $42,651.33 is included in the $43,912.06 amount claimed by petitioner.

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[4] Stip refers to the "STIPULATIONS AS TO UNCONTESTED FACTS" which is record item number 35.

C. Course of Proceedings Below

On February 28, 1992 petitioner filed suit in the Circuit Court of Cook County, Illinois alleging violations of the Uniform Commercial Code and Regulation CC. The Court granted the motion to strike that complaint for failure to satisfy the pleading requirements of Illinois law, and granted petitioner leave to file an amended complaint. Rather than filing an amended complaint, petitioner voluntarily dismissed its state court action and refiled the suit in the Federal District Court (N.D. Ill.) (*See*, Record Item 8 pp. 2-3 and exhibits 1-3 attached to it). The District Court denied a motion to dismiss and subsequently granted petitioner's motion for summary judgment. Pet. App. 5a.

During oral argument the Court of Appeals raised *sua sponte* the question of federal subject matter jurisdiction. After the submission of supplemental statements by the parties, the Court vacated the judgment against respondent and remanded the case to the District Court with instructions to dismiss for lack of jurisdiction.

Petitioner filed a petition for rehearing *en banc*. The Federal Reserve Board filed an *amicus curiae* brief in support of the petition, as did the New York Clearing House Association and Standard Bank and Trust Company. The Court of Appeals denied the petition but amended its opinion. The Court of Appeal's opinion as amended is set forth at J.A. 7-J.A. 9.

SUMMARY OF ARGUMENT

1. This case involves the question of whether section 611 of the EFA Act confers federal district court jurisdiction over a check collection dispute between two Illinois banks. The statute which petitioner claims to grant jurisdiction must be strictly construed with precision and fidelity to its language.

Petitioner's argument is based on the erroneous assertion that subsections 611(a) and 611(f) of the EFA Act are parallel provisions, with the former creating a new federal cause of action against banks by any person other than another bank, and the latter creating the same cause of action between banks.

Petitioner's position is refuted by the text of the statute. The language and structure of subsection 611(a) is unlike that of subsection 611(f). Subsection 611(a) grants any person other than another bank the right to bring an action against a bank for violation of the EFA Act and regulations prescribed pursuant to it. Subsection 611(f) does not grant anyone a right to bring an action. Rather, it grants the Federal Reserve Board the authority to impose on banks or allocate among banks the risks of loss and liability. Subsection 611(a) grants a right to a party. Subsection 611(f) confers decision making authority on the Board. Because there is no provision in section 611 of the EFA Act that creates a cause of action for interbank disputes, that statute does not confer federal jurisdiction.

2. The Federal Reserve Board's view as to whether the EFA Act confers federal court jurisdiction is not entitled to deference. The Board's lack of an administrative

mechanism to adjudicate certain claims cannot create federal court jurisdiction over them. While some deference may be given to the Board's view as to its own adjudicatory authority, the issue of whether the statute confers federal court jurisdiction over interbank disputes is not one in which deference to the Board's construction is appropriate.

3. The Conference Report indicates that EFA Act subsection 611(f) grants the Board the power to resolve interbank disputes administratively. The legislative history does not support petitioner's claim that subsection 611(f) grants banks a cause of action.

4. Subsection 611(f) of the EFA Act does not grant a bank a cause of action. For the same reason that it is insufficient to invoke federal jurisdiction under section 611, it cannot be a basis for obtaining jurisdiction under 28 U.S.C. § 1331.

5. The Uniform Commercial Code expressly incorporates all federal regulations applicable to banks. (UCC § 4-103). Thus, the state courts have provided, and continue to provide, a forum for adjudicating interbank disputes in accordance with the federal regulations.

If a person other than a bank brings an EFA Act claim in federal court, 28 U.S.C. § 1367 allows supplemental jurisdiction over any related claim. Thus, EFA Act claims can still be decided in a single proceeding.

6. The Court of Appeals decision does not conflict with *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989). Lack of an administrative mechanism for resolving interbank EFA Act disputes cannot confer federal

court jurisdiction. The issue in this case is not whether the Board may adjudicate the interbank dispute between petitioner and respondent. The issue is whether the EFA Act confers jurisdiction on the federal district court to decide this dispute.

Unlike the FSLIC in *Coit*, the Board does not have a financial interest that would be affected by its decision. Furthermore, the language of the statute involved in *Coit* is very different from the statutory language involved in the present case.

7. The issue before this Court is not what Congress should have done. The issue is what did Congress do. The public policy arguments asserted by petitioner and *amici curiae* should be directed to Congress rather than this Court.

ARGUMENT

I.

THE STATUTORY LANGUAGE OF THE EFA ACT PRECLUDES FEDERAL COURT JURISDICTION

The sole issue before this Court is whether section 611 of the Expedited Funds Availability Act (12 U.S.C. § 4010) grants the federal district court subject matter jurisdiction over a check collection dispute between two Illinois banks. Prior to that Act, such disputes were considered state law disputes that were governed by the Uniform Commercial Code.[5] Recognizing that federal

[5] Under section 4-103 of the Uniform Commercial Code, any Federal regulations such as Regulation CC (12 C.F.R. Pt.

courts have jurisdiction only to the extent it is conferred by Article III of the Constitution or Statutes enacted by Congress (*Kokkonen v. Guardian Life Insurance Co. of America*, 114 S. Ct. 1673, 1675 (1994)), petitioner and the *amicus curiae* supporting it argue that section 611 of the EFA Act confers such jurisdiction.

The statutory provisions in section 611 of the EFA Act which petitioner claims to confer federal jurisdiction must be construed "with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968). "[S]tatutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction." *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1067 (5th Cir. 1984); *Romero v. International Terminal Operating Co.*, 358, 379-380 (1959). *Also see Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941); *Finley v. United States*, 490 U.S. 545, 552-553 (1989).

The arguments of petitioner and the United States as *amicus curiae* are based upon the erroneous assertion that subsections 611(a) and 611(f) of the EFA Act are parallel provisions, with 611(a) creating a new federal cause of action against banks by any person other than another bank, and subsection 611(f) creating the same cause of action between banks. (See Petitioner's Br. pp. 5, 14; *Amicus Curiae* Br. For United States p. 6). Their contention that subsection 611(d) confers federal jurisdiction is based upon their erroneous claim that subsection 611(f)

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229) the regulations relied upon by petitioner, or Regulation J (12 C.F.R. Pt. 210) are incorporated into the state law. 810 ILCS 5/4-103(a) and (b).

grants to banks a new federal cause of action against banks which is similar to the cause of action that subsection 611(a) grants to persons other than banks.

Petitioner's position fails to adhere to the "precision and . . . fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968). The terms by which Congress expressed its wishes in subsection 611(a) differ substantially from those in subsection 611(f).

As in all cases involving construction of a statute, the starting point is the language of the statute itself. *E.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979); *Bread Political Action Committee v. Federal Election Committee*, 455 U.S. 577, 580 (1982). Subsection 611(a) of the EFA Act provides:

> **(a) Civil Liability**
>
> Except as otherwise provided in this section any depository institution which fails to comply with any requirement imposed under this chapter or any regulation prescribed under this chapter with respect to any person other than another depository institution is liable to such person in an amount equal to the sum of –
>
> (1) any actual damage sustained by such person as a result of the failure;
>
> (2)(A) in the case of an individual action, such additional amount as the Court may allow, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or
>
> (B) in the case of a class action, such amount as the court may allow, except that –

(i) as to each member of the class, no minimum recovery shall be applicable; and (ii) the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same depository institution shall not be more than the lesser of $500,000 or 1 percent of the net worth of the depository institution involved; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

Subsection 611(f) of the EFA Act provides:

(f) Authority to establish rules regarding losses and liability among depository institutions.

The Board is authorized to impose on or allocate among depository institutions the risks of loss and liability in connection with any aspect of the payment system, including the receipt, payment, collection, or clearing of checks, and any related function of the payment system with respect to checks. Liability under this subsection shall not exceed the amount of the check giving rise to the loss or liability, and, where there is bad faith, other damages, if any, suffered as a proximate consequence of any act or omission giving rise to the loss or liability.

Even a cursory comparison of those two subsections discloses that they are very different. Subsection 611(a) grants to persons other than depository institutions a right to sue for violations of the EFA Act and regulations prescribed under it. Subsection 611(f) does not grant banks a right to sue, but grants the Federal Reserve Board

the power to impose on or allocate among banks the risks of loss and liability.

Subsection 611(a) was modeled on 15 U.S.C. § 1640(a), the civil liability section in the Federal Truth in Lending Act. *See* S. Rep. No. 19, 100th Congr. 1st. Sess. 70 (1987). Subsection 611(a) authorizes "any person *other than another depository institution*" to bring a civil action against any depository institution which fails to comply with the EFA Act or any regulation prescribed under the EFA Act. 12 U.S.C. § 4010(a) (emphasis added).

The language and the structure of subsection 611(f) is unlike that of subsection 611(a).[6] Contrary to the statement at page 14 of Petitioner's Brief, subsections 611(a) and 611(f) do not both create liability. Subsection 611(a) provides that "any depository institution which fails to comply with any requirement imposed under this chapter or any regulation prescribed under this chapter with respect to any person other than another depository institution is liable to such person in an amount equal to. . . ." In contradistinction, subsection 611(f) does not provide that a depository institution is liable to another depository institution. Rather, it authorizes The Board of Governors of the Federal Reserve System "to impose on or allocate among depository institutions the risks of loss

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[6] Unlike subsection 611(a), subsection 611(f) is not modeled on the Truth in Lending Act. (15 U.S.C. § 1640(a)). Although respondent does not know of a specific Act on which § 611(f) is modeled, it should be noted that the limitations on damages in § 611(f) are based on section 4-103(c) of the UCC 810 ILCS 5/4-103(c). *See Amicus Curiae* Br. For United States pp. 14-15 n.9.

and liability in connection with any aspect of the payment system. . . . " This language grants the Board of Governors the power to decide whether a bank is liable. It is very different from subsection 611(a)'s language which grants to any person other than a bank a cause of action in which a federal court will decide whether a bank is liable.

A statute must be read as a whole, and the meaning of language depends on context. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991). Thus, the textual difference between subsections 611(a) and 611(f) are significant. *Id.* When Congress modeled EFA Act § 611(a) on the Truth in Lending Act (15 U.S.C. § 1640(a)), Congress knew that the language it used would create a federal cause of action. *See Tower v. Moss*, 625 F.2d 1161 (5th Cir. 1980). Indeed, it shows that Congress knew how to create a federal cause of action when that was the intent. *See King v. St. Vincent's Hospital* 502 U.S. 215, 221 n.9. The fact that Congress used very different language and structure in subsection 611(f) shows that Congress did not intend subsection 611(f) to create the same type of cause of action as subsection 611(a) creates. When Congress uses particular language in one section of a statute and uses different language and structure in another section, there is a presumption that Congress has acted intentionally and did not intend both sections to grant the same type of right. *See Russello v. United States*, 464 U.S. 16, 23 (1983); *International Organization of Masters Mates & Pilots v. Brown*, 498 U.S. 466, 475-476 (1991); *also see Palmore v. United States*, 411 U.S. 389, 395 (1973).

The text of EFA Act subsection 611(f) provides that "[t]he Board is authorized to impose on or allocate among

depository institutions the risk of loss and liability. . . . " Petitioner argues that this text indicates that Congress contemplated that the Board would exercise this authority by rule-making, even though "rules" or "regulations" are not mentioned in the text of subsection 611(f). (Petitioner's Brief p. 14). Petitioner contends that the text of the statute is clear (Petitioner's Brief p. 15), but also argues that the title of subsection 611(f) resolves the ambiguity in the text (*Id.* at 14).

Although the text in subsection 611(f) does not refer to authority to prescribe rules or regulations, the title to that subsection does. Titles of statutory sections may not be used to change the plain meaning of the statutory text. *Brotherhood of Railroad Trainman v. Baltimore & O.R.R.*, 331 U.S. 519, 528-529 (1947). They may, however, be used as an aid to resolve an ambiguity. *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 388-389 (1959).

In this case the plain language of subsection 611(f) only authorizes the Board to exercise the adjudicatory function of imposing or allocating the risk of loss or liability. If, however, subsection 611(f) authorizes the Board to prescribe regulations, then the only subsection in section 611 that creates a civil cause of action for violation of such regulations is subsection 611(a). That subsection expressly does not authorize actions by another depository institution.

II.

THE FEDERAL RESERVE BOARD'S VIEW AS TO WHETHER THE EFA ACT CONFERS FEDERAL COURT JURISDICTION IS NOT ENTITLED TO DEFERENCE

The Board construes section 611(f) of the EFA Act as not conferring on it any authority to adjudicate interbank claims under the EFA Act or regulations prescribed pursuant to the Act. The Court of Appeals' decision does not require the Board to exercise such authority. The Court of Appeals correctly holds that the Board's view that it lacks such authority and/or its failure to exercise such authority cannot confer subject matter jurisdiction on the federal courts. (*See* J.A. 9).

Although some deference may be given to the Board's view as to its own adjudicatory authority, the issue of whether section 611 of the EFA Act confers federal court jurisdiction over interbank check collection disputes is not one in which deference to the Board's construction is appropriate. In *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-447 (1987) the Court held that the issue before it was a pure question of statutory construction for the Courts to decide. The Court rejected the claim that deference should be given to the construction urged by INS. Citing *Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), the Court explained:

> "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent [citing cases.] If a Court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."

INS v. Cardoza-Fonseca, 480 U.S. at 446-447.

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) is inapposite to the case at bar. *Schor* involved the question of whether the commission could entertain certain types of counterclaims in reparation proceedings. In deferring to the commission's interpretation of the statute as to the commission's jurisdiction, the Court placed great emphasis on the fact that Congress had ratified that administrative construction. *See id.* 478 U.S. at 845-846.

Petitioner's reliance on *Reiter v. Cooper*, 113 S. Ct. 1213 (1993) is also misplaced. In *Reiter* there was no question about the fact that federal subject matter jurisdiction existed. The question was whether exhaustion of administrative remedies was required before proceeding to the courts. The Court held the exhaustion doctrine to be inapplicable because the Interstate Commerce Commission ("ICC") had construed its statute as giving it no power to provide any administrative remedies. Although the Court gave deference to the ICC's construction, that construction did not seek to regulate the scope of federal court jurisdiction conferred by the statute. *See id.* 113 S. Ct. at 1220-1221.

In the present case the Board has taken the position that section 611 of the EFA Act does not grant it authority to administratively adjudicate interbank check disputes, and such disputes may only be adjudicated by the courts.

If the Board's view were correct, under *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638 (1990), no deference should be given to the Board's view as to whether a bank may invoke federal rather than state court jurisdiction under the EFA Act. *Adams Fruit Co., Inc. v. Barrett* involved a private right of action granted by the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"). The Court held that the Secretary of Labor was not the adjudicator of such claims, and the Secretary's view as to the scope of judicial power was not entitled to any deference. The Court stated:

> Moreover, even if AWPA's language establishing a private right action is ambiguous, *we need not defer to the Secretary of Labor's view of the scope of § 1854 because Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute. A precondition to deference under Chevron is a congressional delegation of administrative authority.* . . . No such delegation regarding AWPA's enforcement provisions is evident in the statute. Rather, Congress established an enforcement scheme independent of the Executive and provided aggrieved farmworkers with direct recourse to federal court where their rights under the statute are violated. Under such circumstances, it would be inappropriate to consult executive interpretations of § 1854 to resolve ambiguities surrounding the scope of AWPA's judicially enforceable remedy.

Congress clearly envisioned, indeed expressly mandated, a role for the Department of Labor in administering the statute by requiring the Secretary to promulgate standards implementing AWPA's motor vehicle provisions. § 1841(d).

> *This delegation, however, does not empower the Secretary to regulate the scope of the judicial power vested by the statute. Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental "that an agency may not bootstrap itself into an area in which it has no jurisdiction.*

494 U.S. at 649-650 (citations omitted, emphasis added).

In the present case, because the Board asserts that it has no adjudicatory authority over EFA Act interbank disputes, its position is similar to that of the Secretary of Labor in *Adams Fruit Co. v. Barrett, supra*. The judicial power is outside the scope of the Board's authority. Therefore, the Board's view as to whether the EFA Act grants federal court jurisdiction is not entitled to any deference. *Also see Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986).

III.

THE LEGISLATIVE HISTORY FURTHER CONFIRMS THAT THE EFA ACT DOES NOT CONFER FEDERAL COURT JURISDICTION OVER INTERBANK DISPUTES

The Legislative history of the EFA Act further confirms the correctness of the holding of the Court of Appeals. The Conference Report states in pertinent part:

> Subsection (f) of section 611 authorizes the Federal Reserve to establish liability among depository institutions for violation of the regulations or failure to meet the standards imposed by the regulations promulgated under section 609. It permits the Federal Reserve to allocate the risks of loss and liability in connection with

> any aspect of the payment system, including the receipt, payment, collection, or clearing of checks, and any related function of the payment system with respect to checks.
>
> For example, under this subsection, the Federal Reserve may allocate or impose liability on depository institutions for risks of losses incurred by other depository institutions, their accountholders, or other owners or holders of a check due to a depository institution's failure to handle the check in accordance with regulations imposed under Section 609.

H.R. Conf. Rep. No. 261, 100th Cong. 1st. Sess. 183 (1987). This statement indicates that subsection 611(f) grants the Board the power to resolve interbank EFA Act disputes administratively.

The legislative history does not support petitioner's claim that Congress intended to confer federal court jurisdiction over interbank disputes. Petitioner argues that as originally passed by the House and Senate, the language of subsection 611(a) was broad enough to authorize interbank actions. Petitioner's position is based upon: (a) the fact that the original bill did not expressly limit its grant of a cause of action to any person other than another depository institution; and (b) the assumption that Congress intended the term "person" to include depository institutions.

A word appearing in several places in an act is generally read the same way each time it appears. *Ratzlaf v. United States*, 114 S. Ct. 655, 660 (1994). Section 610(c)(2) (12 U.S.C § 4009(c)(2)) seems clearly to be using the term "person" in a way that does not include a depository

institution within that term. Thus, it is far from clear that the early versions of the bills would have authorized interbank causes of action. The version which was enacted (excluding actions by depository institutions) may simply be a clarification of the intent of the earlier draft.

In any event, the version which Congress enacted expressly excludes interbank actions from the cause of action it grants. When there is a change of a provision in a bill in the conference committee, it strongly militates against a judgment that Congress intended a result it had declined to enact. *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).

IV.

28 U.S.C. § 1331 DOES NOT CONFER JURISDICTION IN THIS CASE

Petitioner and *amici curiae* contend that if EFA Act section 611 does not confer jurisdiction, 28 U.S.C. § 1331 does. Initially, it should be noted that this argument is beyond the scope of the question before this Court. The sole question is whether section 611 of the EFA Act grants federal court jurisdiction in this case.

Petitioner's argument is based on an incorrect reading of subsection 611(f) of the EFA Act. Petitioner states: "Subsection (f) creates an interbank cause of action by providing for [l]iability under this subsection in the amount of the check giving rise to the loss or liability, . . . " Subsection 611(f) does not create liability for any amount. Rather, it authorizes the Board to impose on or allocate among banks the risks of loss and liability

and, except in cases of "bad faith", limits the amount that the Board may impose or allocate to the amount of the check giving rise to the loss or liability.

Proceeding from the incorrect premise that subsection 611(f) creates an interbank cause of action, petitioner claims that 28 U.S.C § 1331 grants jurisdiction over that cause of action. For the same reason that subsection 611(f) does not create a cause of action for purposes of subsection 611(d), it also does not create a cause of action for purposes of 28 U.S.C. § 1331.

V.

THE COURT OF APPEALS DECISION DOES NOT DENY BANKS A JUDICIAL FORUM FOR EFA ACT INTERBANK DISPUTES

A.

Federal Reserve Regulations Are Incorporated Into The Uniform Commercial Code And Enforceable In State Courts

Regulation CC (12 C.F.R. Pt. 229) is incorporated into the Uniform Commercial Code ("UCC") by UCC section 4-103 (810 ILCS 5/4-103). Section 4-103(a) of the UCC provides that: "[t]he effect of the provisions of this article may be varied by agreement. . . . " UCC section 4-103(b) provides: "Federal Reserve Regulations and operating circulars, clearing house rules, and the like have the effect of agreements under subsection (a), whether or not specifically asserted to by all parties interested in items handled." Subsection (c) provides that: "action or non-action . . . pursuant to Federal Reserve Regulations or operating circulars is the exercise of ordinary care. . . . "

In *Appliance Buyers Credit Corp. v. Prospect National Bank*, 505 F. Supp. 163, 164 (C.D. Ill. 1981) *aff'd* 708 F.2d 290 (7th Cir. 1983) the Court held that by its own terms the UCC is modified by Federal Reserve Regulations. Therefore, under state law, in interbank disputes such as the present case, the rights and duties of the banks are governed by the Federal Reserve Regulations. *See United Postal Savings Association v. Royal Bank Mid-County*, 784 S.W. 2d 906 (Mo. Ct. App. 1990) where the Court applied 12 C.F.R. Pt. 210 through UCC § 4-103. *Id.* 784 S.W. 2d at 908 n.4; *Union National Bank of Little Rock v. Metropolitan National Bank*, 265 Ark. 340, 578 S.W. 2d 220, 223 (Sup. Ct. Ark. In Banc 1979); *Marquette National Bank v. Heritage Pullman Bank & Trust Co.*, 109 Ill. App. 3d 532, 534-535, 440 N.E. 2d 1033, 1035-1036 (1st Dist. 1982).

B.

DENIAL OF FEDERAL JURISDICTION ON INTERBANK CLAIMS WILL NOT RESULT IN MULTIPLE OR FRAGMENTED ADJUDICATION

The Federal Reserve Board has declined to exercise adjudicatory authority over interbank disputes. Therefore, the only forum available to adjudicate them is the courts. If a person other than a depository institution brings an EFA Act claim in the federal courts against a bank, and the bank has a third party claim against another bank which arises out of the same transaction, the federal courts now have jurisdiction to decide both claims in a single proceeding. This jurisdiction to resolve the entire controversy is conferred by the supplemental jurisdiction statute (28 U.S.C. § 1367(a)) which became

effective December 1, 1990.[7] The predictions by petitioner and *amici curiae* of multiple proceedings, fragmented claims and judicial inefficiency are simply incorrect.

VI.

THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH *COIT V. FSLIC*

The Court of Appeals' decision states that disputes such as the present case are to be handled administratively before the Federal Reserve Board or in the state courts. Petitioner and the United States argue that the portion of that statement which refers to administrative proceedings before the Board places the Court of Appeals' decision in conflict with this Court's decision in *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989).

First it must be pointed out that even if the Board does not have an administrative mechanism for resolving interbank EFA Act disputes, lack of such an mechanism cannot confer federal court jurisdiction over them. Moreover, *Coit* is inapposite to the present case. In *Coit* a state court suit was filed by Coit against FirstSouth, a federal savings and loan association. FirstSouth was declared insolvent and FSLIC was appointed as receiver; FSLIC substituted itself in the *Coit* lawsuit, and removed the case to federal court. Thus, FSLIC stood in the shoes of

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[7] *Finley v. United States*, 490 U.S. 545 (1989) raised doubts about the availability of pendent party jurisdiction, but invited Congress to enact legislation on this subject. *Id.* 490 U.S. at 556. Congress responded by enacting 28 U.S.C. § 1367. *See* H.R. Rep. No. 734, 101st Cong. 2nd Sess. 28 (1990).

FirstSouth and was defending Coit's claim. The Court held that FSLIC's statutory power to settle and compromise a claim against it is distinguishable and inconsistent with a power to adjudicate that claim. *Id.* 489 U.S. at 573.[8]

Unlike *Coit*, in the present case the Federal Reserve Board does not have a stake in the outcome of the dispute between petitioner and respondent. Furthermore, the statutory language in *Coit* authorizing FSLIC "to settle, compromise, or release claims in favor of or against the insured institution" (489 U.S. at 573) is very different from the EFA Act's language authorizing the Federal Reserve Board "to impose on or allocate among depository institutions the risks of loss and liability. . . . "

The issue before this Court is not whether the Board may adjudicate the interbank dispute between petitioner and respondent. The issue is whether the EFA Act confers on the federal district court jurisdiction to decide this dispute.

VII.

POLICY CONSIDERATIONS CANNOT GOVERN THE READING OF THE STATUTE

Petitioner and the *amicus curiae* briefs argue that public policy considerations justify the granting of federal court jurisdiction over interbank check collection

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[8] 12 U.S.C. § 1821(d)(6)(A) was enacted in response to this Court's decision in *Coit Independence Joint Venture v. FSLIC, supra*. It provides administrative procedures for determining contested claims. *See* H.R. Rep. No. 54(I) 101st Cong. 1st Sess. 86, 214-215 (1989); *Meliezer v. Resolution Trust Co.*, 952 F.2d 879, 881-882 (5th Cir. 1992).

disputes. Petitioner, the United States, and the New York Clearing House argue that unless this Court holds that the EFA Act grants federal court jurisdiction, there will not be an adequate forum to decide EFA Act disputes. As discussed in Section V. of this brief, the Court of Appeals decision does not have the dire consequences they predict.

More importantly, the public policy arguments advanced by petitioner and in two of the *amicus curiae* briefs misperceive the issue before this Court. The issue is not what Congress should have done. The issue is what did Congress do. These policy considerations should be addressed to Congress, not the Court. They cannot govern the reading of the language in the statute *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344-345 (1979); *also see Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 374-375 (1986).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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October 20, 1995

No. 94-1175

In The

Supreme Court of the United States

OCTOBER TERM, 1995

BANK ONE, CHICAGO, N.A.,

Petitioner,

v.

MIDWEST BANK & TRUST COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Although respondent observes (Resp. Br. 8) that jurisdictional statutes should be construed "with precision and with fidelity to the terms by which Congress has expressed its wishes," *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968), respondent largely ignores the terms Congress used

in 12 U.S.C. § 4010(f). Congress authorized interbank "[l]iability under this subsection" for "damages," terms that ordinarily refer to compensation recovered in a court of law. See Pet. Br. 13. Respondent's brief does not discuss the meaning of these statutory terms, nor does it acknowledge that Congress used the identical term "liability" in § 4010(a), which respondent concedes (Resp. Br. 10) authorizes actions by persons other than banks. Similarly, although respondent recites the rule that a statute must be read as a whole, Resp. Br. 12, citing *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991), respondent ignores § 4010(d), which provides in unmistakably clear language that "[a]ny action under" § 4010 may be brought in a United States district court.[1]

Respondent argues (Resp. Br. 8-12) that Congress did not intend to authorize judicial actions under § 4010(f), because the language of § 4010(f) is different from the language of § 4010(a). The differing language of the two subsections suggests no such conclusion. Their language differs because subsection (a) provides a specific remedy to customers in the event a bank fails to make deposited funds available within the time specified by Congress, while subsection (f) delegates to the Federal Reserve Board authority to establish liability rules to govern the more complex and technical subject of interbank check payments. Nothing in either subsection indicates that

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[1] Although the Court has strictly construed certain jurisdictional statutes that raise significant concerns under principles of federalism, see, *e.g.*, *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) (diversity); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (removal), the Court has not adopted a blanket rule that all federal jurisdictional statutes, including those that confer concurrent jurisdiction on state and federal courts to decide federal claims, are strictly construed. See, *e.g.*, *Powell v. McCormack*, 395 U.S. 486, 515 (1969) (Congress intended 28 U.S.C. § 1331 "to provide a broad jurisdictional grant to the federal courts") (citations omitted).

Congress intended to provide a federal judicial forum for adjudication of one category of claims but not the other. To the contrary, both subsections authorize liability for damages and place limits on the amount of damages that can be recovered.

There is no basis for respondent's suggestion (Resp. Br. 13) that the Board lacks authority to promulgate interbank liability rules. Subsection (f) confers rulemaking authority on the Board by authorizing it to allocate "risks of loss and liability" rather than actual losses. See Pet. Br. 13-14. The title of subsection (f), "Authority to establish rules regarding losses and liability among depository institutions," confirms that conclusion. Furthermore, the EFA Act itself establishes no interbank liability rules. It would make no sense for Congress to direct the Board to adjudicate violations of non-existent rules.

2. The language that respondent quotes from the Conference Report (Resp. Br. 17-18) states that the Board is authorized "to allocate the *risks* of loss and liability in connection with any aspect of the payment system." H.R. Conf. Rep. No. 261, 100th Cong., 1st Sess. 183 (1987) (emphasis added). Contrary to respondent's suggestion, that language indicates that the Board is authorized to promulgate rules allocating risks of loss, but not to adjudicate liability for actual losses.

Respondent also asserts (Resp. Br. 18-19) that the word "person," as used elsewhere in the EFA Act, does not include depository institutions. In support of this assertion, petitioner cites 12 U.S.C. § 4009(c)(2), which refers to "any depository institution" or "any *other* person subject to the authority of the Board . . . ." (Emphasis added). Contrary to petitioner's assertion, the language of § 4009(c)(2) indicates that a depository institution *is* a "person." See also § 4010(a) ("any

person *other than* another depository institution") (emphasis added); 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise," the term "person" includes "corporations, companies, associations, firms, partnerships, and joint stock companies, as well as individuals").

On the assumption that subsection (a), as originally passed by the House and Senate, was broad enough to authorize interbank actions, respondent argues (Resp. Br. 19) that Congress should be presumed not to have intended a result that it declined to enact. Resp. Br. 19 (citing *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974)). But Congress did not simply alter the language of subsection (a) to exclude actions by banks. At the same time, it added subsection (f), which delegated to the Board authority to promulgate interbank liability rules, subject to congressionally-imposed limitations on damages. There is no indication that in so doing Congress intended to deny a federal judicial forum for interbank claims.

3. Respondent contends (Resp. Br. 22-23) that this Court's decision in *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989), is distinguishable because the Board had a stake in the underlying claim in *Coit*, and because the statutory language at issue in *Coit* was different from the language in this case.

The Court's decision in *Coit* looked to the relevant "statutory framework" and concluded "that when Congress meant to confer adjudicatory authority on FSLIC it did so explicitly and set forth the relevant procedures in considerable detail." 489 U.S. at 574. Nothing in the Court's opinion in *Coit* indicates that this principle applies only if the agency has a stake in the claims to be adjudicated.

Although the statutory language at issue in *Coit* differs from the language of subsection (f), neither provision explicitly conferred authority to adjudicate private claims on the agency, and the context of both provisions "indicates clearly that when Congress meant to confer adjudicatory authority . . . it did so explicitly and set out the relevant procedures in considerable detail." 489 U.S. at 573-74. Accordingly, the Court's reasoning in *Coit* is fully applicable to this case.

4. Respondent concedes (Resp. Br. 14) that the Board's view that it lacks authority to adjudicate private claims for damages under the EFA Act is entitled to "some deference." That concession is compelled by decisions such as *Reiter v. Cooper*, 113 S. Ct. 1213, 1221 (1993), and *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986).[2] Respondent contends that the Court should not defer to the Board's view that federal courts have jurisdiction to decide interbank disputes under § 4010 and Regulation CC. These are not unrelated questions, however, because it is highly unlikely that Congress created private liability for damages without providing a federal forum for adjudication of liability claims. See *infra* pp. 6-7.

Respondent's reliance on *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638 (1990), is misplaced. In *Adams Fruit*, the Court declined to defer to the agency's view of the scope of a statute "because Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action under the statute." 494 U.S. at 649. The issue in this case is precisely whether Congress has

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[2] Congress's ratification of the agency interpretation at issue in *CFTC v. Schor* was not the sole reason for judicial deference, but merely a reason why deference was "especially warranted." 478 U.S. at 845.

established the federal judiciary as adjudicator of interbank claims under § 4010 and Regulation CC. Respondent's argument based on *Adams Fruit* thus assumes an answer to the question presented in this case — indeed, it assumes that petitioner and the government are *correct* in arguing that the Board is not authorized to adjudicate interbank claims.[3]

5. Respondent observes (Resp. Br. 20-21) that the provisions of Regulation CC are enforceable through Section 4-103(2) of the Uniform Commercial Code, which provides that "Federal Reserve regulations and operating letters, clearing house rules, and the like," have the effect of agreements to vary the provisions of the UCC, "whether or not specifically assented to by all parties . . .." The existence of a state law cause of action under the UCC does not imply the absence of a federal cause of action under the EFA Act and Regulation CC. Congress provided a federal judicial forum for adjudication of claims by non-banks; it would be highly unusual for Congress to establish a regime of interbank liability for damages without also providing a federal forum for adjudication of interbank claims. "In the absence of a plain indication to the contrary, . . . it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law." *NLRB v. Natural Gas Utility District*, 402 U.S. 600, 603 (1971), citing *Jerome v. United States*, 318 U.S. 101, 104 (1943). See also *Adams Fruit*, 494 U.S. at 646 (rejecting contention that, "where Congress authorizes a private right of action to vindicate a federal right, we should assume that Congress has conditioned the right on the unavailability of a state remedy"). There is

[3] *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), provides no support for respondent. In that case, the Court employed traditional tools of statutory construction and concluded that Congress had provided a clear answer to the question at issue. *Id.* at 449.

no reason to think that Congress, having granted the Federal Reserve Board authority to promulgate interbank liability rules with preemptive effect, would make the availability of a forum to adjudicate violations of those liability rules turn on whether a particular State chooses to enact a provision of the UCC.

6. Contrary to respondent's assertion (Resp. Br. 19), the question whether federal courts have jurisdiction over interbank claims under 28 U.S.C. § 1331 is a subsidiary question that is fairly included within the more general question whether federal courts have subject matter jurisdiction over interbank disputes under § 4010. See S. Ct. Rule 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.").[4] In *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 607 n.6 (1978), moreover, the court held that § 1331 provided a sufficient jurisdictional basis for the suit even though the party invoking federal jurisdiction had not cited § 1331 and no party had raised the jurisdictional issue in the lower courts or in this Court. *Id.* at 607-08 n.6.

Respondent does not dispute that, if subsection (f) creates a cause of action, then the action arises under federal law for purposes of 28 U.S.C. § 1331. Respondent errs, however, in assuming (Resp. Br. 20) that if subsection (f) does not create a cause of action, then § 1331 does not apply. An action arises under federal law for purposes of § 1331 if it arises under a federal statute *or* a federal regulation promulgated pursuant to congressional authority. See Pet. Br. 21.

[4] As stated in the petition, the question presented is "Whether, despite the express grant of jurisdiction to the United States district courts in the Expedited Funds Availability Act, the 7th Circuit erred in determining that banks cannot pursue the cause of action created by the Federal Reserve Board pursuant to the Congressional delegation of authority contained in the Act." Pet. i.

Regulation CC plainly provides for an interbank cause of action, see 12 C.F.R. § 229.38, and thus § 1331 provides an additional basis for federal jurisdiction.

7. Respondent contends (Resp. Br. 21-22) that affirming the court of appeals' decision will not result in fragmented proceedings. Respondent reasons that the "Board has declined to exercise adjudicatory authority," and "[t]herefore, the only forum available to adjudicate them is the courts." *Id.* at 21. If this Court were to hold that Congress intended the Board to adjudicate interbank claims, however, the Board undoubtedly would respond by establishing some form of administrative claims tribunal, and the fragmentation discussed in petitioner's opening brief (at pp. 22-23) would occur.

Finally, respondent contends (Resp. Br. 21-22) that if an action is filed in a federal court under § 4010(a) by a plaintiff other than a bank, the court would have jurisdiction over interbank claims arising out of the same set of facts under the supplemental jurisdiction statute, 28 U.S.C. § 1367. Section 1367 does not apply if Congress has "expressly provided otherwise." *Id.* Elsewhere in its brief, respondent contends (Resp. Br. 13) that § 4010 "expressly" precludes federal jurisdiction over interbank actions.

For the foregoing reasons, and those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 94-1175

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BANK ONE, CHICAGO, N.A., PETITIONER

v.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Expedited Funds Availability Act, 12 U.S.C. 4001 *et seq.*, grants federal courts jurisdiction over inter-bank disputes concerning the collection of checks.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether a federal court may adjudicate a private inter-bank civil liability claim under the Expedited Funds Availability Act (EFA Act), 12 U.S.C. 4001 *et seq.* Congress has charged the Board of Governors of the Federal Reserve System (Federal Reserve Board or Board) with primary responsibility for administering the EFA Act, which supplements established state and federal law governing the collection of checks. The Federal Reserve Board has promulgated implementing regulations reflecting the Board's understanding that the

courts, and not the Board, will adjudicate private damage actions under the Act. Following the court of appeals' ruling that federal courts lack jurisdiction over inter-bank disputes, the Board filed a brief amicus curiae in that court supporting a petition for rehearing, which the court denied. Petitioner sought review in this Court, and the Court invited the Solicitor General to file a brief amicus curiae expressing the views of the United States. The United States urged that the petition for a writ of certiorari be granted and now urges that the court of appeals' decision be reversed.

STATEMENT

The EFA Act addresses aspects of the national system of payment by check. The Act contains a section entitled "Civil Liability," 12 U.S.C. 4010, that (1) spells out the right of persons, other than depository institutions, to recover damages for a depository institution's failure to comply with the Act's funds availability requirements, 12 U.S.C. 4010(a), and (2) authorizes the Board of Governors of the Federal Reserve System "to impose on or allocate among depository institutions the risks of loss and liability in connection with any aspect of the payment system," 12 U.S.C. 4010(f). Subsection 4010(d) provides that "[a]ny action under this section may be brought in any United States district court, or in any other court of competent jurisdiction." 12 U.S.C. 4010(d). The Board has set out liability principles pursuant to 12 U.S.C. 4010(f) in Regulation CC, 12 C.F.R. Pt. 229.

Petitioner Bank One, Chicago, N.A., sued respondent Midwest Bank and Trust Company in federal district court and sought to hold Midwest liable in damages for a violation of Regulation CC's requirements. The district court entered summary judgment for Bank One, Pet. App. 5-14, but the court of appeals vacated that judgment and ordered dismissal on the ground that the federal district court lacked jurisdiction over the dispute, *id.* at 1-3.

1. Congress enacted the EFA Act as Title VI of the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 635, in order to accelerate the availability of funds to bank depositors and to improve the Nation's check payment system. See H.R. Rep. No. 52, 100th Cong., 1st Sess. 1-2, 12-14 (1987).[1] Congress acted in response to public concern that depository institutions were unduly delaying depositor access to deposited funds by placing temporary "holds" on those deposits. Depositors complained that they frequently encountered difficulties in using their checking accounts because of those holds. See S. Rep. No. 19, 100th Cong., 1st Sess. 25-28 (1987); Regulation CC, 53 Fed. Reg. 19,372 (1988) (preamble).[2]

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[1] Checks are only one part of the national payment system, which has both cash and non-cash components. The Federal Reserve is integrally involved in all aspects of the payment system. Its cash services include the distribution of currency and coin and the removal of unfit notes and coins from circulation. Its non-cash services include the collection of checks, the processing of electronic fund transfers, and the provision of net settlement services to private clearing arrangements. See Board of Governors of the Federal Reserve System, *The Federal Reserve System: Purposes & Functions* 94-95 (1994).

[2] Depository institutions (which we shall generally refer to collectively as banks) imposed the holds to protect themselves against the risk that deposited checks would not be paid, which risk resulted in part from inter-bank delays in the return of "bad checks." The longer that a bank was uncertain whether a check would be paid, the longer the bank maintained the hold

The EFA Act responds to that problem in two ways. First, it imposes specific requirements on banks to hasten the availability of funds to depositors. See 12 U.S.C. 4002-4006 (1988 & Supp. V 1993).[3] Second, the Act delegates broad discretion to the Board to reduce the banks' nonpayment risk through improvements in the check payment system. It authorizes the Board to consider various changes in its check processing system and to issue implementing regulations. See 12 U.S.C. 4008.[4]

The EFA Act supplements an established legal framework governing the inter-bank check collection process, which continues to be governed primarily by state law. Although the Board has always exercised control over the process of collecting and returning checks and other items handled through the Federal Reserve System, see Regulation J, 12 C.F.R. Pt. 210, state commercial law—particularly Articles 3 and 4 of the Uniform Commercial Code—has historically

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to protect itself against the risk of nonpayment. See S. Rep. No. 19, *supra*, at 25-28.

[3] For example, the Act contains provisions setting out funds availability schedules, 12 U.S.C. 4002 (1988 & Supp. V 1993), schedule exceptions, 12 U.S.C. 4003 (1988 & Supp. V 1993), bank disclosure requirements regarding funds availability, 12 U.S.C. 4004, and other related provisions, 12 U.S.C. 4005-4006.

[4] The EFA Act also empowers the Board to create by regulation exceptions to the statutorily specified schedules for funds availability in order to protect banks against certain risks. Compare 12 U.S.C. 4002(a)(2), (b), (c), and (e) (1988 & Supp. V 1993) (establishing mandatory schedules for availability) with 12 U.S.C. 4003(b), (d), and (e) (1988 & Supp. V 1993) (expressly authorizing the Board to create exceptions for specified areas of risk, including large checks, repeated overdrafts, fraud, and emergency conditions).

established the basic legal rights and responsibilities respecting negotiable instruments, bank deposits, and collections. The EFA Act recognizes the long-standing and important role of state law in banking transactions, and it preserves state laws that impose more stringent funds availability requirements than the Act itself provides. 12 U.S.C. 4007(a). The Act explicitly provides, however, that the Board's regulations implementing the EFA Act will otherwise supersede inconsistent state laws, including the Uniform Commercial Code. 12 U.S.C. 4007(b).[5]

The EFA Act authorizes the Board and other federal banking agencies to compel banking institutions within the agencies' respective jurisdictions to comply with the Act's statutory and regulatory requirements. See 12 U.S.C. 4009 (1988 & Supp. V 1993). Subsection 4009(a) authorizes enforcement primarily through Section 8 of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1818 (1988 & Supp. V 1993), which allows banking agencies to issue cease-and-desist orders, impose civil penalties, and pursue other sanctions. See 12 U.S.C. 4009(a) (1988 & Supp. V 1993). Subsection 4009(c)(1) grants the Federal Reserve Board residual authority to enforce any requirements that are not "specifically committed to some other Government agency under subsection (a) of this section." 12 U.S.C. 4009(c)(1). See

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[5] See generally H.R. Conf. Rep. No. 261, 100th Cong., 1st Sess. 177-182 (1987); E.L. Rubin, *Uniformity, Regulation, and the Federalization of State Law: Some Lessons from the Payment System*, 49 Ohio St. L.J. 1251 (1989).

H.R. Conf. Rep. No. 261, 100th Cong., 1st Sess. 183 (1987).[6]

The EFA Act also contains civil liability provisions, which are the subject of this suit. See 12 U.S.C. 4010. Subsection 4010(a) addresses a depository institution's liability to a person or entity other than another depository institution. It states as follows:

> Except as otherwise provided in this section, any depository institution which fails to comply with any requirement imposed under this chapter or any regulation prescribed under this chapter with respect to any person other than another depository institution is liable to such person in an amount equal to the sum of [a prescribed measure of damages].

12 U.S.C. 4010(a). Subsection 4010(f) addresses a depository institution's liability to others arising out of the payment system. Its coverage includes the liability of one depository institution to another. Subsection 4010(f) states as follows:

[6] Section 4009 generally parallels the FDI Act in allocating responsibility for enforcement of the EFA Act among the financial institution regulatory agencies, depending upon the nature and charter of each financial institution. See 12 U.S.C. 1818(a), (b), and (i) (1988 & Supp. V 1993). Subsection 4009(c) supplements that approach by giving the Board enforcement authority over institutions that are outside of the jurisdiction of any of the banking agencies under the FDI Act, but are within the scope of the EFA Act as participants in the payment system. Those institutions include the Federal Reserve Banks, Federal Home Loan Banks, and units of local government. See 12 C.F.R. 229.2(e).

> The Board is authorized to impose on or allocate among depository institutions the risks of loss and liability in connection with any aspect of the payment system, including the receipt, payment, collection, or clearing of checks, and any related function of the payment system with respect to checks. Liability under this subsection shall not exceed the amount of the check giving rise to the loss or liability, and, where there is bad faith, other damages, if any, suffered as a proximate consequence of any act or omission giving rise to the loss or liability.

12 U.S.C. 4010(f). Subsection 4010(d) provides for federal (and state) court jurisdiction over civil liability suits, stating:

> Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year after the date of the occurrence of the violation involved.

12 U.S.C. 4010(d).

The Board has implemented the EFA Act, including specification of the principles governing check collections, through Regulation CC. 12 C.F.R. Pt. 229; see 53 Fed. Reg. 19,433 (1988). Regulation CC contains three subparts: Subpart A defines terms and provides for administrative enforcement of violations of the other Subparts; Subpart B contains the funds availability schedules and disclosure requirements specified in the Act, including banks' liability to depositors for violations of those requirements (12 C.F.R. 229.21); and Subpart C includes rules to speed the collection and return of checks, including rules relating to banks' liability under Subsection 4010(f)

for breaches of duties defined in those rules (12 C.F.R. 229.38).[7]

Regulation CC recognizes that the EFA Act provides a statutory grant of judicial jurisdiction over civil liability claims (12 U.S.C. 4010(d)) by stating that an action under Subpart C "may be brought in any United States district court, or in any other court of competent jurisdiction." 12 C.F.R. 229.38(g). Regulation CC implements the EFA Act provisions for administrative enforcement in terms that closely track the text of Section 4009 of the EFA Act. 12 C.F.R. 229.3. It does not establish any administrative tribunal for inter-bank check collection claims.

2. Petitioner Bank One (formerly First Illinois Bank and Trust) sued respondent Midwest Bank and Trust in federal district court, alleging that Midwest had violated its duties under Regulation CC. See Pet. App. 18-21. Bank One's complaint stated that a Bank

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[7] As one commentator explained,

> [f]or the most part, Subpart B restates the rules of the statute and fills in a number of details.
>
> Subpart C takes Congress up on its invitation to revamp check collection rules in order to encourage quicker returns. Unlike Subpart B, Subpart C does not follow precise statutory guidelines but paints the picture itself. Subpart C contains rules to expedite the collection and return of checks, just as Subpart B contains rules to expedite funds availability for the depositor.

B. Clark & B. Clark, *Regulation CC: Funds Availability and Check Collection* ¶ 2.01 (1988). The Board designed the provisions of Subpart C to complement the statutory availability schedules in Subpart B. Subpart C's check system improvements decrease risks of nonpayment for banks by "reduc[ing] the number of situations when the bank will be required by law to make funds available to its customers before it learns a check has been dishonored." See 53 Fed. Reg. 19,373 (1988).

One customer had deposited a check drawn on a Midwest account. *Id.* at 6, 18. When Bank One submitted the check to Midwest through normal banking channels for collection, Midwest returned it for a guarantee of endorsement. *Ibid.* Bank One provided the guarantee and made the funds available to the Bank One customer. *Id.* at 7, 19. Midwest later refused payment of the check based on the lack of sufficient funds in the Midwest payor's account. *Id.* at 7-8, 19. Bank One contended that Midwest had violated its legal obligations by failing to provide timely notice that the payor had insufficient funds to cover the check. *Id.* at 19-21.

Midwest moved to dismiss Bank One's suit under Rule 12(b)(6), Fed. R. Civ. P., on the ground that Bank One had failed to state a claim on which relief could be granted. See Pet. App. 17, 20. The district court denied that motion, holding that Bank One had stated an actionable claim under the Federal Reserve Board's Regulation CC, which requires banks to "exercise ordinary care and act in good faith in complying with" Regulation CC's check collection requirements, 12 C.F.R. 229.38(a). See Pet. App. 20-22. The court ruled on cross-motions for summary judgment that "Midwest did not act with ordinary care in returning the check for guarantee of endorsement without first checking the sufficiency of the funds in support of the check." *Id.* at 12. It entered judgment for Bank One in the amount of $43,912.06. *Id.* at 15-16.

Midwest appealed. The court of appeals questioned during oral argument whether the federal district court had subject matter jurisdiction over the dispute. Pet. App. 2. The court of appeals ordered supplemental briefing on that issue, and it later ruled

that the EFA Act does not grant federal court jurisdiction over inter-bank disputes. *Id.* at 1-3. The court of appeals concluded that Congress had intended that those disputes would "be handled administratively" under Subsection 4009(c)(1), which grants the Federal Reserve Board residual authority to enforce requirements of the EFA Act that are not "committed to some other Government agency." 12 U.S.C. 4009(c)(1). The court held:

> Therefore, if plaintiff can state a colorable violation under the Regulations, it must make its case before the Board of Governors rather than the federal courts.

Pet. App. 2. The court vacated the judgment and ordered the district court to dismiss the action for lack of jurisdiction. See *id.* at 3.

Bank One petitioned for rehearing, and the Federal Reserve Board filed a brief as amicus curiae supporting that petition. The Board stated that Regulation CC contemplated that inter-bank civil liability claims would be cognizable in federal court, see 12 C.F.R. 229.38(g), and also pointed out that the Board had not created an administrative mechanism for handling such claims. The court of appeals denied the petition for rehearing, but modified its opinion. It deleted the passage, quoted above, directing Bank One to "make its case before the Board," and it modified the paragraph that had contained that passage to state as follows (additions in italics):

> Disputes such as this, between members of the Federal Reserve system, are to be handled administratively before the Board of Governors of the Federal Reserve System pursuant to 12 U.S.C. § 4009(c)(1) *(or perhaps in state court)*. This conclusion is bolstered by the provisions of 12 U.S.C. § 4010(f), which authorize the Federal Reserve Board to establish liability among "depository institutions" such as these parties. *Although the Board of Governors has informed us that no mechanism is currently available for administrative resolution of such disputes, the Board's differing interpretation of this statute cannot confer jurisdiction upon the Court.*

Pet. App. 24-25.

SUMMARY OF ARGUMENT

The EFA Act's civil liability provisions establish private remedies for violation of the Act's requirements. Those provisions prescribe specifically the scope and measure of remedies that are available to bank customers for a bank's violation of the Act's funds availability requirements, but they direct the Federal Reserve Board to determine the scope of the remedies for inter-bank payment system disputes. The Act expressly provides for concurrent federal and state court jurisdiction over a check collection dispute in both situations.

The court of appeals' ruling that the Board must resolve inter-bank disputes is inconsistent with the text, structure, and history of the Act. It is also inconsistent with this Court's presumption in *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989), that, when Congress intends to confer adjudicatory authority upon administrative agencies, it does so explicitly.

The court of appeals should not have rejected the Board's reasonable and correct interpretation of its powers. The court's interpretation is particularly questionable because of its potential practical con-

sequence of fragmenting the resolution of payment system disputes among state, federal, and administrative fora, rather than allowing a single tribunal, state or federal, to resolve the dispute. The ultimate result of the court's interpretation would be to diminish the effectiveness of the Board's check collection rules.

ARGUMENT

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE EFA ACT REQUIRES THE FEDERAL RESERVE BOARD, RATHER THAN THE COURTS, TO ADJUDICATE INTER-BANK DISPUTES OVER THE PAYMENT OF CHECKS

The court of appeals erred in concluding that the EFA Act directs the Federal Reserve Board, rather than the courts, to resolve inter-bank civil liability suits relating to the check payment system. The court has rejected the Board's reasonable interpretation of its powers and has adopted an implausible construction of the Act that would impair the statute's operation.

1. The EFA Act establishes a civil liability regime for violations of the statute and the Board's implementing regulations. 12 U.S.C. 4010. Subsection 4010(a) creates bank liability toward anyone other than a bank for a bank's failure to comply with the funds availability requirements set out in the statute and the prescribed regulations. See 12 U.S.C. 4010(a). That subsection refers to individual and class "action[s]" that may be brought to enforce this liability, and it also establishes the allowable damages as well as other aspects of the action. Subsection 4010(f) addresses liability arising from the inter-bank payment system. That subsection authorizes the Board "to impose on or allocate among depository

institutions the risks of loss and liability in connection with any aspect of the payment system." 12 U.S.C. 4010(f). It does not specify the measure of damages recoverable for "liability under this subsection," but does limit the total amount of that liability to the amount of the check and, in cases of bad faith, to additional consequential damages.

The court of appeals concluded that the liability of banks to depositors under Subsection 4010(a) was enforceable in court, but that the liability of one bank to another under Subsection 4010(f) could be enforced only in "administrative proceedings." In reaching that conclusion, the court relied in large part on the fact that the liability standard for inter-bank disputes is set by Federal Reserve Board regulations. In giving that feature of the statute conclusive weight, the court appears to have misunderstood the reason for the differences between Subsections 4010(a) and 4010(f).

Congress designed Subsection 4010(a) to provide a specific remedy against banks that failed to make funds promptly available to their customers. Later in the drafting process, Congress added Subsection 4010(f) to deal with the more complex and technical problem of providing remedies, particularly among banks, for losses that result from the inter-bank check payment system. Congress left it to the Board to determine the liability standards for losses in the inter-bank payment system because of the greater complexity of that subject, and not because Congress intended to create remedies that would be adjudicated in different fora.

Congress was familiar with depositor complaints respecting funds availability, which had provided the impetus for the legislation. See, *e.g.*, S. Rep. No. 19,

100th Cong., 1st Sess. 25-28 (1987) (describing consumer studies and congressional hearings). It crafted Section 4010(a) to provide the specific standard of liability and the measure of damages that would govern depositor claims, following the form of other statutory consumer remedies in the financial services industry. See 12 U.S.C. 4010(a).[8] In the course of considering the legislation, the drafters recognized that questions of liability arising from the inter-bank payment system presented a more complex commercial issue. During the Senate-House conference on the legislation, Subsection 4010(f) was added in order to authorize the Board, which has specialized knowledge concerning the inter-bank check collection process, to determine the principles governing liability in that area.[9]

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[8] Subsection 4010(a) was modeled after the civil liability provisions of the Truth in Lending Act, 15 U.S.C. 1640, which allow private parties to bring judicial damage suits to ensure compliance with statute. See S. Rep. No. 19, *supra*, at 70; H.R. Rep. No. 52, *supra*, at 22. See also Equal Credit Opportunity Act, 15 U.S.C. 1691e (1988 & Supp. V 1993); Electronic Fund Transfer Act, 15 U.S.C. 1693m.

[9] Compare H.R. Conf. Rep. No. 261, *supra*, at 105-106 (conference version of civil liability provisions) with H.R. Rep. No. 52, *supra*, at 10-11 (House version of civil liability provisions) and S. 790, 100th Cong., 1st Sess. § 609 (1987) (Senate version of civil liability provisions). The drafters of Subsection 4010(f) channeled the Board's discretion by specifically directing the agency's attention to liability issues involving the payment system and by imposing a damage limitation adopted from antecedent Uniform Commercial Code provisions, which the EFA Act supplements and to some extent supersedes. Subsection 4010(f)'s limitation on damages conforms to the long-standing provisions of U.C.C. Art. 4-103(e), which state that the measure of damages for failure to exercise ordinary care in handling a check is the amount of the check (reduced by the amount that could not have been realized by the exercise of ordinary care), and provide for consequential damages in cases of bad faith.

Congress appropriately entitled Subsection 4010(f) "Authority to establish rules regarding losses and liability among depository institutions." 12 U.S.C. 4010(f). That subsection delegates to the Board the quasi-legislative role of prescribing the standard of liability for inter-bank check payment disputes. Subsection 4010(f) thus directs the Board to "allocate" among banks "the risks of loss and liability." 12 U.S.C. 4010(f). The Board has done so by establishing through regulation the basis for damage claims.[10] But Subsection 4010(f)'s direction does not indicate that the Board should actually adjudicate those claims, and the Board accordingly recognizes that any such claims should be adjudicated through the courts. 12 C.F.R. 229.38(g).[11]

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[10] For example, the Board has specified the standard of care among banks for processing checks, the consequences of a paying bank's failure to make a timely return of a check, the responsibility for legible endorsements, and the application of comparative negligence principles. See, *e.g.*, 12 C.F.R. 229.38.

[11] Subsection 4010(f) also allows the Board to "impose on" banks "the risks of loss and liability" in connection with check payment. The Board has interpreted that phrase as authorizing the Board to subject banks to standards of care with respect to the payment system that are actionable by non-bank entities. See 12 C.F.R. 229.38(a) (stating that a bank is liable if it breaches a duty of care owed to the depository bank, the bank's customer, the owner of the check, or another party to the check). For example, the Board has provided that if the paying bank returns a check to a depository bank, the depository bank must promptly notify the customer who deposited the check. See 12 C.F.R. 229.33(d). The customer may re-

Not only does Subsection 4010(f) contain no suggestion that the Board would adjudicate damage actions, but Congress in addition stated explicitly in Subsection 4010(d) of the EFA Act that the courts would determine damage claims through judicial actions. Subsection 4010(d), which is entitled "Jurisdiction," states:

> Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction.

12 U.S.C. 4010(d). By its terms, Subsection 4010(d)'s grant of jurisdiction extends to all of Section 4010's subsections, including Subsection 4010(f). Its reference to "[a]ny action under this section" clearly appears to embrace a damage suit based on Subsection 4010(f).[12] If Congress had intended that Subsection 4010(f) claims would be resolved through agency rather than court adjudication, it appears likely that it would have said so in light of the broad and otherwise controlling language of Subsection 4010(d).[13]

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cover actual damages if the depository bank fails to provide notice, 12 C.F.R. 229.38(a), but the customer must seek that remedy through a court action, 12 C.F.R. 229.38(g).

[12] Legislatures and courts use the term "action" to describe "a legal demand of one's right." *Bradford* v. *Southern Ry.*, 195 U.S. 243, 248 (1904) (citing Lord Coke); see also *Neal* v. *Honeywell, Inc.*, 33 F.3d 860, 863 (7th Cir. 1994) ("The word 'action' * * * connotes formal legal proceedings."). Subsection 4010(d) empowers the courts to adjudicate a "legal demand" by one bank against another based on the Board's specification, pursuant to Subsection 4010(f), of their respective rights. See generally *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979).

[13] The legislative history also supports court jurisdiction for proceedings to enforce liability under Subsection 4010(f). As we have noted, Subsection 4010(f) was added during the House-Senate conference. The Conference Report on the Competitive Equality Banking Act of 1987, of which the EFA Act was a part, describes Subsection 4010(f) and states in relevant part:

> This subsection does not limit causes of action brought by accountholders or the amount of damages recoverable by accountholders under any *other* action.

H.R. Conf. Rep. No. 261, *supra*, at 183 (emphasis added). The drafters' reference to "other" actions manifests their view that a proceeding between banks to recover losses or damages under Subsection 4010(f) would be an "action" for purposes of Subsection 4010(d).

2. The language, structure, and history of the EFA Act's civil liability provisions thus all indicate that federal and state courts, rather than the Board, would adjudicate inter-bank payment disputes. The court of appeals' contrary ruling—which holds that Congress not only gave the Board authority to determine the standard of liability, but also the power to adjudicate specific claims—would vest the Board with a very unusual power.

Congress regularly authorizes federal agencies to establish criteria that determine whether one private party is civilly liable to another in a judicial action. See, *e.g.*, Securities Act of 1933, 15 U.S.C. 77k (imposing civil liability for failure to provide registration information required by the Securities and Exchange Commission); Consumer Product Safety Act, 15 U.S.C. 2072 (imposing civil liability for violations of consumer product rules promulgated by the Consumer Product Safety Commission); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9607(a)(4)(B) (imposing civil liability for environmental response costs that are consistent with the Environmental Protection Agen-

cy's national contingency plan). But Congress does not normally confer upon an administrative agency authority to adjudicate purely private disputes. If Congress had wished to confer that power on an administrative agency, one would expect that it would have done so explicitly.[14]

This Court indicated in *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989), that it would not lightly infer that Congress has vested an administrative agency with the power to adjudicate private disputes. The Court ruled in *Coit* that the Federal Savings and Loan Insurance Corporation (FSLIC) lacked authority to establish an administrative claims forum to adjudicate creditors' claims against insolvent thrift institutions. *Id.* at 572-579. The Court explained that "when Congress meant to confer adjudicatory authority on FSLIC it did so explicitly and set forth the relevant procedures in

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[14] Although Congress itself usually determines the elements of a legal action, Congress may delegate some or all of that responsibility to an agency, especially where the delegated issue "involves a complex policy choice" and the task "requires an expertise and attention to detail that exceeds the normal province of Congress." *Babbitt* v. *Sweet Home Chapter of Communities for a Greater Oregon*, 115 S. Ct. 2407, 2418 (1995) (recognizing that Congress has implicitly authorized the Secretary of the Interior to define the term "harm" for purposes of enforcing the Endangered Species Act of 1973); see also *Touby* v. *United States*, 500 U.S. 160, 162-163 (1991) (recognizing that Congress has explicitly authorized the Attorney General to identify new controlled substances for purposes of criminal enforcement). But Congress does not normally assign the agency responsibility for both determining a liability standard and applying it in the context of specific private claims. It is therefore reasonable to expect that Congress would be explicit in granting that adjudicatory power.

considerable detail." *Id.* at 574. It noted that the FSLIC's authorizing statute contained no such provisions in the case of creditor claims. *Ibid.* Like the statutory provisions in *Coit*, the civil liability provisions of the EFA Act are devoid of indicia demonstrating that Congress intended to vest the Board, rather than the courts, with authority to adjudicate inter-bank disputes. See 12 U.S.C. 4010.[15]

The court of appeals suggested that the Board could exercise such power "pursuant to 12 U.S.C. § 4009(c)(1)," which grants the Board residual authority to "enforce" the EFA Act. See Pet. App. 2, 24-25. Section 4009, however, addresses "[a]dministrative enforcement"—not civil liability—and it authorizes banking agencies to use traditional agency enforcement tools, including cease-and-desist orders and civil sanctions, to compel compliance with the Act. See H.R. Conf. Rep. No. 261, *supra*, at 183 ("[Section 4009] requires the Federal banking regulators to use existing administrative enforcement mechanisms to enforce compliance with [the EFA Act]."). Subsec-

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[15] The EFA Act stands in sharp contrast to statutes that do include provisions for administrative adjudication of private claims. See, *e.g.*, Commodity Exchange Act, 7 U.S.C. 18 (1988 & Supp. V 1993); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 919-928. In those statutes, Congress expressly confers and describes the adjudicatory powers. See 7 U.S.C. 18(a)-(f) (1988 & Supp. V 1993) (describing the right to an adjudication, authorizing the agency to establish relevant procedures, imposing bond requirements, and providing mechanisms for enforcement and judicial review); accord 33 U.S.C. 919-928 (describing the adjudicatory mechanism in comprehensive detail).

tion 4009(c) does not create any mechanism for the adjudication of inter-bank civil liability claims.[16]

Section 4009 of the EFA Act contains other enforcement procedures, but the court of appeals did not rely on them and they do not include any mechanism that could reasonably be used to enforce the allocation of liability in inter-bank disputes. The remedies available under 12 U.S.C. 1818 (1988 & Supp. V 1993), including cease-and-desist orders and civil monetary penalties, cannot effectively "impose on or allocate among depository institutions the risk of loss and liability" in connection with the payment system, as mandated by Subsection 4010(f). Cf. *Ratner* v. *Chemical Bank New York Trust Co.*, 309 F. Supp. 983, 986 (S.D.N.Y. 1970) (Board's authority to enforce the Truth in Lending Act under Section 1818 "does not allow a private party to bring an action before the Board to seek redress or injunctive relief for any violation of the Act").[17]

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[16] The court of appeals erroneously characterized Subsection 4009(c) as an open-ended source of enforcement authority. Subsection 4009(c), which provides for the ultimate sanction of exclusion from the payment system, is reserved for the payment system participants that are not otherwise subject to bank regulatory enforcement actions under Subsection 4009(a). See 12 U.S.C. 4009(c)(1) and (2). Subsection 4009(c) does not authorize Board enforcement action against an insured depository institution such as the respondent here.

[17] None of the Section 1818 procedures may be initiated independently by a private party, such as a bank. Moreover, the only FDI Act mechanism that could be used to direct one institution to pay another provides for "restitution" and not for "damages." The restitution remedy is normally available only upon a showing that the respondent institution was unjustly enriched or had acted with reckless disregard for the law. See 12 U.S.C. 1818(b)(6)(A) (Supp. V 1993); see *Wachtel* v. *OTS*, 982 F.2d 581, 584-586 (D.C. Cir. 1993). Those limitations on recovery are inconsistent with Subsection 4010(f)'s provisions regarding damages, which clearly envisage recovery even in circumstances in which unjust enrichment or reckless disregard could not be shown.

The situation presented here closely resembles the situation presented in *Coit*. The Court recognized in that decision that the FSLIC had administrative enforcement powers, but nevertheless treated those powers as distinct from any authority to adjudicate disputes between private parties. See 489 U.S. at 574. The same result should follow here. Section 4009 does not contain any reference to administrative adjudication of private disputes, any reference to the Administrative Procedure Act, or any provision for judicial review. It is therefore unlikely that Congress intended Section 4009 to authorize the creation of a novel administrative claims tribunal for inter-bank check collection disputes. See *ibid.*[18]

3. The court of appeals' decision here is also flawed because it rejects a reasonable construction of the EFA Act by the agency principally charged with its administration. See, *e.g.*, *Chevron U.S.A. Inc.* v.

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[18] That conclusion comports with the practical realities that existed when the EFA Act was enacted. In 1987, none of the banking agencies employed full-time administrative law judges, but instead borrowed them from other agencies on an "as-needed" basis. Those agencies established an inter-agency "pool" of administrative law judges in 1989, after Congress enacted an explicit mandate. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 916, 103 Stat. 486-487. Congress is unlikely to have vested the Board with potential responsibility for adjudicating all of the Nation's inter-bank check payment disputes under an "existing" mechanism (H.R. Conf. Rep. No. 261, *supra*, at 183) that did not include any administrative law judges.

Natural Resources Defense Council, Inc., 467 U.S. 837, 842-845 (1984). This Court accords "substantial deference" to the Federal Reserve Board's interpretation of banking statutes that the Board administers "whenever its interpretation provides a reasonable construction of the statutory language and is consistent with legislative intent." *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 207, 217 (1984); see *Board of Governors* v. *Investment Company Institute*, 450 U.S. 46, 68 (1981); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971).

The Board has concluded that the EFA Act does not envision administrative adjudication of inter-bank check collection disputes. In the absence of controlling indications of contrary legislative intent, the court of appeals should have given deference to the Board's interpretation. The Board is the agency that Congress charged with implementing the statute from its inception, and that agency's reasonable and contemporaneous construction would normally "carry the day against doubts that might exist from a reading of the bare words of a statute." See, *e.g.*, *Good Samaritan Hospital* v. *Shalala*, 113 S. Ct. 2151, 2159 (1993), quoting *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

In rejecting the Board's views, the court of appeals has conferred novel powers on the Board that the Board itself disavows and has replaced the Board's understanding of the EFA Act's division of responsibilities with a very unusual jurisdictional scheme. Under the Board's construction, all check-related claims may be raised in a single judicial tribunal—either in federal court, which would have supplemental jurisdiction over state claims (including

Uniform Commercial Code claims embodying standards established by Regulation CC), see 28 U.S.C. 1367 (Supp. V 1993), or in a state court of competent jurisdiction.[19]

In contrast, the court of appeals' decision envisions that federal and state courts would adjudicate depositor claims, but that the Board (or other banking agencies with power to "enforce" the Act) would adjudicate inter-bank claims under the EFA Act, while state courts would adjudicate inter-bank state law claims under the Uniform Commercial Code (and "perhaps" claims under the EFA Act). Pet. App. 25. Under the court of appeals' interpretation, a single check collection dispute could generate both an administrative and a judicial adjudication. Banks would be forced to sever customer claims from inter-bank claims and conduct routine inter-bank commercial litigation in a potentially distant and unfamiliar administrative forum.

It is unlikely that Congress meant to fragment adjudicative responsibilities in that way.[20] Congress

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[19] The Uniform Commercial Code article dealing with bank deposits and collections treats "Federal Reserve regulations and operating circulars" as agreements between participants in the payment system whether or not specifically assented to by the parties. U.C.C. 4-103(b); see, *e.g.*, Ill. Ann. Stat. ch. 810, para. 5/4-103(b) (Smith-Hurd 1993). State law provides for a cause of action to recover damages for breach of such an agreement. See, *e.g.*, Ill. Ann. Stat. ch. 810, para. 5/4-111 (Smith-Hurd 1993) (action to enforce obligation arising under article must be commenced within three years after cause of action accrues).

[20] Respondent Midwest argued below that Congress had intended that state courts alone would enforce the Board's liability rules. That construction is also doubtful. Congress nor-

normally does not "prefer the eccentric to the routine." See *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 68 (1987) (Scalia, J., concurring in part and concurring in the judgment). Its commercial enactments should be construed in light of the traditional preference of the "law merchant" for efficient resolution of disputes. If Congress had intended to require banks to initiate proceedings in the District of Columbia to obtain an administrative adjudication of their bad-check claims, it likely would have "delivered those instructions in more clear fashion." See *id.* at 68-69. The EFA Act does not dictate that result, and the court of appeals has supplied no reason why Congress would have desired that procedure.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1995

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mally provides a federal forum for adjudication of federal law. See 28 U.S.C. 1331.

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No. 94-1175

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BANK ONE, CHICAGO, N.A.,
Petitioner,
v.
MIDWEST BANK & TRUST COMPANY,
an Illinois Banking Corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE ELECTRONIC CHECK CLEARING HOUSE ORGANIZATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Amicus, the Electronic Check Clearing House Organization ("ECCHO"), respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of petitioner. Consent to file this brief has been obtained from counsel for petitioner Bank One, Chicago, N.A.* Counsel for respondent Midwest Bank & Trust Company has declined to consent.

The United States Court of Appeals for the Seventh Circuit held below that the federal district courts do not have original jurisdiction to hear disputes between depository institutions arising under the Expedited Funds Availability Act, 12 U.S.C. 4001 *et seq.* (the "EFAA"). Fur-

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* Correspondence reflecting the consent of petitioner has been filed with the Clerk of the Court.

ther, the court of appeals held that the appropriate forum for resolution of such disputes is the Board of Governors of the Federal Reserve System (the "Federal Reserve"), or alternatively, perhaps the state courts. The court of appeals not only has erroneously construed the EFAA, but has unilaterally conferred the authority to adjudicate inter-bank check clearing disputes on the nation's largest provider of check-clearing services, the Federal Reserve.

ECCHO is a not-for-profit nationwide bank clearing house whose current membership consists of 78 banks representing approximately 70 percent of the deposits of the 100 largest banks in the United States. ECCHO has established the legal and operational framework under which its member banks collect checks among themselves electronically, through the exchange of electronic information about the checks with the paper checks to follow. Electronic check clearing offers a number of advantages, including the substantial acceleration of the transmission of information about checks and their return. It is estimated that, on an annualized basis for 1995, checks valued at approximately $244 billion will be collected through the ECCHO system.

The Federal Reserve and ECCHO are currently the two principal providers of nationwide electronic check clearing services in the United States.

ECCHO's rules governing electronic check clearing among its members are governed by and are subject to the EFAA and the Federal Reserve's Regulation CC implementing the EFAA, 12 C.F.R. Pt. 229 ("Regulation CC"). Disputes between ECCHO member banks with respect to checks collected under the ECCHO system inevitably will involve disputes under Regulation CC. Accordingly, ECCHO and its member banks are directly affected by the court of appeals' decision that the federal courts do not have jurisdiction to resolve inter-bank check clearing disputes under the EFAA and Regulation CC. Furthermore, ECCHO has a particular interest in a holding that its principal competitor, the Federal Reserve, is the sole federal forum for adjudication of inter-bank check clearing disputes under the EFAA and Regulation CC. In the Monetary Control Act of 1980, Title I, Pub. L. No. 96-221, 94 Stat. 140 (1980) ("MCA"), Congress established detailed rules governing the Federal Reserve's provision of check collection services in competition with private sector providers, such as ECCHO. It is inconceivable that only seven years later Congress intended in the EFAA to so fundamentally alter this competitive balance between the Federal Reserve and the private sector established in the MCA by authorizing the Federal Reserve to serve as adjudicator of inter-bank disputes, without any indication of such intent in the EFAA or its legislative history.

For the foregoing reasons, the motion by ECCHO for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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August 31, 1995

QUESTION PRESENTED FOR REVIEW

Whether, despite the express grant of jurisdiction to the United States district courts in the EFAA, the Seventh Circuit erred in determining that banks cannot pursue the cause of action created by the Federal Reserve pursuant to the Congressional delegation of authority contained in the EFAA.

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BRIEF OF THE ELECTRONIC CHECK CLEARING HOUSE ORGANIZATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Electronic Check Clearing House Organization ("ECCHO") is a not-for-profit nationwide bank clearing house founded in 1990 dedicated to promoting electronic check collection and related payments system improvements. ECCHO's current membership consists of 78 banks located throughout the United States representing approximately 70% of the deposits of the nation's 100 largest banks. A list of ECCHO's current membership is provided in the Appendix.

ECCHO has established the legal and operational framework under which banks participating in the ECCHO ssytem collect checks among themselves through

the exchange of electronic information. The conversion of paper checks into electronic information and the subsequent transmission of such electronic information to the bank paying the check is known as electronic check presentment or "ECP." ECP offers a number of advantages, including the acceleration of the collection of the check and the transmission of information about whether the check will be paid or dishonored, as well as the potential reduction of expenses associated with the collection and return of the check. It is estimated that, on an annualized basis for 1995, approximately 240 million checks with a value of approximately $244 billion will be collected through the ECCHO system. In addition to its existing ECP services, ECCHO also is engaged in significant research and development efforts to apply other emerging technologies, such as image and other computer-based technology, toward improving the nation's check collection system.

ECCHO and the Federal Reserve System (the "Federal Reserve") currently are the two principal competing providers of nationwide ECP services.[1]

ECCHO is concerned that the Seventh Circuit's holding that the Federal Reserve is authorized to adjudicate disputes under the Expedited Funds Availability Act, 12 U.S.C. 4001 *et seq.* ("EFAA"), and the Federal Reserve's Regulation CC implementing the EFAA, 12 C.F.R. Pt. 229 ("Regulation CC"), will, contrary to Congress' intent, tip the balance established by Congress governing the competition between the Federal Reserve and ECCHO with respect to the operation and development of ECP against ECCHO and in favor of the Federal Reserve.

[1] While certain local check clearing houses also provide ECP services, these services generally are available only where both the bank presenting the check and the bank paying the check are located in the same geographic region serviced by the local clearing house. ECCHO and the Federal Reserve currently are the principal two providers of ECP services that can be used by a bank to present checks to another bank, regardless of the banks' locations.

SUMMARY OF ARGUMENT

The Seventh Circuit's holding that the federal courts do not have original jurisdiction to hear inter-bank disputes arising under the EFAA and Regulation CC, and that the Federal Reserve is the only federal forum available to resolve such disputes, is an erroneous interpretation of the EFAA. The Seventh Circuit's holding is without legal basis and is wholly inconsistent with the role established by Congress for the Federal Reserve as a competitor in the market for check clearing services. It is inconceivable that Congress, which had seven years previously explicitly delineated detailed rules governing the Federal Reserve's competition with private sector providers of check collection services, intended in the EFAA to so fundamentally alter the Federal Reserve's role by authorizing it to serve as adjudicator of such disputes, without any indication of such intent in the EFAA or its legislative history.

ARGUMENT

A major part of the business of commercial banking in the United States involves the transfer of funds among checking accounts of bank customers. *See* H. J. Bailey & R. B. Hagedorn, *Brady on Bank Checks* § 11.4 at 11-6 (7th ed. 1992). These transfers are typically effected through the use of checks written by the bank's customers.[2] The check represents the instruction of the "drawer" of the check to its bank to pay to the "payee" of the check (or a subsequent transferee) the amount specified on the check and to charge the drawer's account for such amount. For over 100 years, the check collec-

[2] In calendar year 1993, approximately 59.4 billion commercial (exclusive of government) checks were written. Bank For International Settlements, Payment Systems in the Group of 10 Countries 110 (1994).

tion process has involved the physical delivery of paper checks between banks as the means by which banks transmit to each other, and consequently act upon, the payment instructions embodied in checks.

In a simple check transaction, a payee receives a check as payment from a drawer. The payee then deposits that check in the payee's deposit account at its bank, called under Regulation CC the "depositary bank," and waits for the check to "clear" so that the payee can have access to the deposited funds. The check clearing process begins when the depositary bank sends the checks directly, or more typically through one or more other intermediary collecting banks, to the drawer's bank, called under Regulation CC the "paying bank." The paying bank determines whether to pay the check, generally based on the amount of funds in the drawer's deposit account. If the paying bank pays the check, it debits the drawer's account and pays the depositary bank (or intermediary collecting bank). If the paying bank determines there are insufficient funds in the drawer's account to cover the check, for example, it may determine not to pay the check, *i.e.*, to dishonor the check. In this event, the paying bank returns the check to the depositary bank, and in certain cases also is required to notify the depositary bank that the check will be returned. Upon receipt of the returned check or notice, the depositary bank notifies its customer, the payee, that the check has "bounced" and will attempt to recover any credit the depositary bank previously had provided to the payee in connection with the check. This process of check clearing (including the return of the check to the depositary bank) could take several days because there may be several intermediary collecting banks handling the check between the depositary bank and the paying bank, and because the check must be transported physically to each bank in this check-clearing chain.

The importance of this process to the viability of the national economy is recognized by Congress, as evidenced by Congress' granting to the Federal Reserve in 1913

when it enacted the Federal Reserve Act, 12 U.S.C. 221 *et seq.*, the authority to participate in the nationwide process of check clearing. Between 1913 and 1980, the Federal Reserve offered, in addition to other payments system services, check clearing services[3] without charge to Federal Reserve member banks.[4] In the Monetary Control Act of 1980 (the "MCA"),[5] Congress determined that all depository institutions in the United States, regardless of whether they were Federal Reserve member banks, would be required to maintain reserves with the Federal Reserve.[6] In return, they received the right to obtain payment services, including check collection services, directly from the Federal Reserve. In order to promote the efficiency that would result from fair competition between the Federal Reserve and private sector providers of payment services, Congress required the Federal Reserve to charge all depository institutions a market-equivalent rate for its payments services and to comply

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[3] These check clearing services essentially consisted of receiving checks from depositary bonks, or other collecting banks to which depositary banks had sent the checks, and transporting these checks to paying banks. The Federal Reserve similarly would transport checks that the paying banks had determined to return unpaid to depositary banks. The Federal Reserve would debit and credit, respectively, accounts these banks maintained with the Federal Reserve to effect the inter-bank payments associated with these checks.

[4] Federal Reserve member banks include all national banks and those state-chartered banks that elect to become members of the Federal Reserve. 12 U.S.C. 222 (national banks), 321 (state-chartered banks). Prior to 1980, only Federal Reserve member banks were required to maintain non-interest bearing reserves with the Federal Reserve. In return, these banks received payment services free of charge from the Federal Reserve. Nonmember banks did not prior to 1980 have direct access to Federal Reserve payment services, including its check clearing services.

[5] Title I of Pub. L. No. 96-221, 94 Stat. 140 (1980).

[6] 12 U.S.C. 461 (1988 & Supp. V 1993).

with certain other competition-promoting requirements.[7] Thus, since 1980, the Federal Reserve has been a direct competitor of banks with respect to its payments system services, including check clearing, in accordance with the current rules established by Congress to govern this competition.

Further, in 1987, Congress determined that in certain cases banks were unduly delaying customers' access to funds represented by checks they had deposited and, in the EFAA, mandated funds availability schedules and delegated to the Federal Reserve the authority to implement these schedules.[8] The Federal Reserve also was authorized to promulgate rules governing the check collection and return system, in order to attempt to ensure that the depositary bank generally had received any check returns or had otherwise learned of the returned check

[7] 12 U.S.C. 248a(c). These requirements are detailed in the Federal Reserve's pricing principles, which the MCA required the Federal Reserve to publish. The Federal Reserve's pricing principles provide that: (i) Federal Reserve services must be priced explicitly; (ii) Federal Reserve services must be made available to nonmember depository institutions at the same fee schedule applicable to Federal Reserve members except that nonmembers may have other requirements imposed, such as minimum balances; (iii) fees generally must be established on the basis of actual costs incurred plus certain imputed costs as if the services had been provided by a private sector firm, *e.g.*, return on capital; (iv) interest on items credited prior to collection must be charged at the then current Federal funds rate; (v) fees should be set so that revenues for major service categories match costs, inclusive of a private sector markup; (vi) service arrangements and related fee schedules must be responsive to changing needs for services in particular markets; and (vii) the structure of fees and service arrangements may be designed to improve both the efficient utilization of Federal Reserve services and to reflect desirable longer-run improvements in the nation's payments system. *See* 3 F.R.R.S. ¶¶ 7-132 to 7-134.

[8] 12 U.S.C. 4008.

prior to the time at which it was required to make funds available to its customer.[9]

Pursuant to the EFAA, the Federal Reserve promulgated Regulation CC, which, like the EFAA, applies to all depository institutions that provide check clearing services, including all of the banks participating in ECCHO. However, notwithstanding the Federal Reserve's rules to accelerate the collection and return of checks noted above, because the check collection process continues to be based on the physical transportation of paper checks, in a significant number of cases the availability schedules of the EFAA and Regulation CC require the depositary bank to permit its customer to withdraw funds before the bank knows whether the check will be paid.[10]

[9] 12 U.S.C. 4008. These rules, among other things, establish requirements concerning: (i) the manner by which, the time within which and the location to which checks are to be returned (12 C.F.R. 229.30(a), 229.31(a)); (ii) markings to be placed on the fronts and backs of checks and returned checks (12 C.F.R. 229.30(d), 229.35); (iii) settlement for checks and returned checks (12 C.F.R. 229.31(c), 229.32(b), 229.36(f)); (iv) notices of nonpayment to the depositary bank and its customers (12 C.F.R. 229.33); and (v) inter-bank warranties and liability (12 C.F.R. 229.34, 229.38). Prior to the adoption of these Federal Reserve rules, the law governing private sector check collection primarily consisted of the Uniform Commercial Code ("UCC") and other state law. The Federal Reserve's rules supplement, and in many cases preempt, such state law. 12 C.F.R. 229.41. Examples of UCC provisions preempted in whole or in part by Regulation CC include UCC Sections 3-415, 4-202, 4-204(b)(1), 4-213(a), 4-214(a), 4-301, 4-302. References to the UCC are to the 1990 Official Text of the UCC.

[10] Under Regulation CC, for example, funds representing a check deposited on Monday at the depositary bank and drawn on a paying bank located in the same geographic check processing region as the depositary bank must be made available to the depositor for withdrawal by the opening of business on Wednesday of that week. 12 C.F.R. 229.12(b). However, the check (i) may not be received by the paying bank until after its close of business on Monday (considered under Section 4-108 of the UCC and Section 229.2(f) of Regulation CC to be received on Tuesday); (ii) the paying bank

If a check is subsequently dishonored after the depositary bank has made the funds available to its customer, the bank is at risk because it may not be able to recoup the amount withdrawn by its customer.

In recent years, technological advances have enabled banks to transmit the payment information embodied in paper checks seperately from delivering the paper checks, *i.e.*, through electronic transmission of data. By reducing reliance on the physical transportation of paper checks, payment information embodied in the checks can be transmitted more quickly and cheaply from the depositary bank to the paying bank. The paying bank can, in turn, transmit information electronically to the depositary bank as to whether such checks may or will be returned. Thus, use of electronics in the check collection process, among other benefits, reduces the banks' exposure because the depositary bank can be advised much earlier than otherwise would be the case whether the check will be dishonored.

ECCHO has established the legal and operational framework under which its participating banks collect checks among themselves through the exchange of electronic information with the paper checks to follow. Through ECP, the depositary bank can send payment

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may not determine to return the check until late in the day on Wednesday as permitted under Section 4-301 of the UCC; (iii) the paying bank accordingly may not return the check until Wednesday night; and (iv) the depositary bank accordingly may not receive the returned check until Thursday morning, a full day after it is required to make the funds representing the check available to the depositor for withdrawal. Under Regulation CC, the paying bank generally is required to return checks such that they are normally received by the depositary bank (and for checks in amounts of $2,500 or more, provide notice by any reasonable means to the depositary bank that the check will be returned) by 4:00 p.m. on the second business day following the banking day on which the check was presented to the paying bank (*i.e.*, by 4:00 p.m. Thursday in the above example). 12 C.F.R. 229.30(a), 229.33(a).

information about a check directly to the paying bank and receive information about whether the check will be paid or dishonored the same or next day. Under such an arrangement, if the depositary bank does not receive this same or next day notice that the check will be dishonored, it can permit its customer to withdraw its funds at that time with the knowledge that the check which its customer has deposited will ordinarily be paid. Obviously, ECP furthers Congress' goal, as reflected in the EFAA, of improving and accelerating the check collection process.

The Federal Reserve and ECCHO are currently the two principal providers of nationwide ECP services in the United States.

Under the Seventh Circuit's holding, the only federal forum available to a depository institution involved in an inter-bank dispute arising under the EFAA is the Federal Reserve.[11] Not only is such a result an incorrect interpretation of the EFAA, but it is also wholly inconsistent with the role established by Congress for the Federal Reserve as a competitor in the market for check clearing services.[12]

When Congress established the Federal Reserve in 1913, it authorized the Federal Reserve to provide check clearing services to its members to expedite the clearance of checks nationwide.[13] The role carved out for the Fed-

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[11] The Seventh Circuit additionally recognized that such disputes could also perhaps be resolved by state courts. ECCHO does not believe that portion of the Seventh Circuit's holding to be relevant to the issue addressed in this brief—whether the federal forum for inter-bank disputes arising under the federal cause of action Congress provided in the EFAA is the federal courts or the Federal Reserve. For the reasons discussed in this brief, ECCHO believes that federal forum to be the federal courts.

[12] ECCHO does not reiterate in this brief the arguments presented by petitioner and *amici* the United States and the New York Clearing House Association.

[13] H.R. Rep. No. 69, 63rd Cong., 1st Sess., at 55-56 (1913).

eral Reserve was altered by Congress over the subsequent years as the payments system evolved, such that today, the Federal Reserve is required to provide its services to all depository institutions in a manner that permits other payments system participants to compete on an equal footing. Congress in the MCA established a competitive balance between the Federal Reserve and private sector providers with respect to payments services, including the electronic check collection services that the Federal Reserve and ECCHO today provide. Congress was aware of this delicate balance when it enacted the EFAA. It is inconceivable that Congress would have in the EFAA altered the balance it had so carefully constructed only seven years earlier by establishing a new role for the Federal Reserve, that of sole federal adjudicator of interbank check collection disputes, without expressly indicating by clear and unambiguous language in the statute or its legislative history that it had done so.

Forcing banks to look to their principal competitor to resolve at the federal level their private disputes under the EFAA, as contemplated by the Seventh Circuit, will inalterably tip the competitive balance established by the MCA toward the Federal Reserve, and against ECCHO and other private sector providers of payments services. The Federal Reserve has in Regulation CC adopted rules governing the private sector check collection and return process, including the ECCHO ECP process. Disputes between banks with respect to checks collected under the ECCHO system inevitably will involve disputes under these Regulation CC rules. Requiring banks to resort to a Federal Reserve adjudicatory procedure to resolve these disputes at the federal level could require a bank to reveal to ECCHO's principal competitor confidential and proprietary business information, the revelation of which could be competitively harmful to ECCHO and the banks participating in the ECCHO system. In addition, the threat that a principal competitor will be reviewing the details of and judging the specific actions, procedures and

responses of a bank in the context of a specific check transaction or transactions will likely deter banks from vigorously pursuing their legitimate claims in a federal forum. The end result of the Seventh Circuit's decision is that banks that are participants in the payments system will be forced to choose between remaining dynamic competitors of the Federal Reserve or zealously asserting their claims in the manner intended by Congress. Given the absence of a direct statutory delegation of adjudicatory authority to the Federal Reserve by Congress, or even a single mention in the legislative history, this cannot be what Congress intended when it enacted the EFAA.

CONCLUSION

For the reasons stated, the decision below should be reversed.

Respectfully submitted,

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August 31, 1995

APPENDIX

APPENDIX

ECCHO MEMBERSHIP
AS OF AUGUST 31, 1995

Banco Central Hispano
Bank of America Arizona
Bank of America California
Bank of America Illinois
Bank of America Texas
Bank of America Washington
Bank of California
Bank of Hawaii
Bank of New York
Bank One, Columbus
Bank One, Kentucky
Bank One, Texas
Bankers Trust
Barnett Bank of Jacksonville
Barnett Bank of South Florida
Boatmen's National Bank
Chase Manhattan Bank (Connecticut)
Chase Manhattan Bank (Delaware)
Chase Manhattan Bank (Maryland)
Chase Manhattan Bank (New York)
Chemical Bank
Citibank, Delaware
Citibank, N.A.
Comerica (Michigan)
CoreStates
Firstar, Milwaukee
First Fidelity Bank
First Interstate Bank of Arizona
First Interstate Bank of California
First Interstate Bank of Denver
First Interstate Bank of Nevada
First Interstate Bank of Oregon
First Interstate Bank of Texas
First Interstate Bank of Washington

First National Bank of Boston
First National Bank of Chicago
First Tennessee Bank
First Union Bank (plus 7 affiliates)
Frost National Bank of San Antonio
Harris Trust & Savings Bank
Key Bank of Oregon
Key Bank of New York
LaSalle National Bank
Marine Midland Bank
Mellon Bank
Mercantile Bank St. Louis
NationsBank (DC)
NationsBank (Florida)
NationsBank (Georgia)
NationsBank (Maryland)
NationsBank (North Carolina)
NationsBank (South Carolina)
NationsBank (Tennessee)
NationsBank (Texas)
NationsBank (Virginia)
Northern Trust Company
Norwest Bank Denver
Norwest Bank Iowa
Norwest Bank Minnesota
PNC Bank
SeaFirst Bank
Shawmut Bank, N.A. (Boston)
Shawmut Bank, Connecticut N.A.
Signet (Virginia)
Texas Commerce Bank
U.S. Bank of California
U.S. Bank of Oregon
U.S. Bank of Washington
Union Bank
United Jersey Bank
Wells Fargo Bank

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*
AND
BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

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October Term, 1994

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

♦

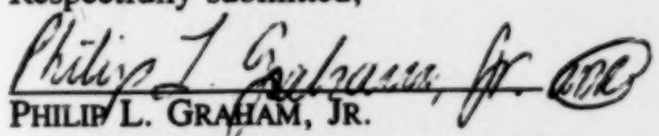
MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The New York Clearing House Association respectfully moves pursuant to Rules 21 and 37.1 of the Rules of this Court for leave to file the brief annexed hereto as *amicus curiae* supporting the petitioner. The petitioner has consented to the filing of the brief, but respondent has declined to consent.

The decision of the Court of Appeals for the Seventh Circuit, which denies banks access to federal courts in interbank disputes arising under the Expedited Funds Availability Act, raises a question of substantial importance to Clearing House members and, if allowed to stand, will substantially and adversely affect them. For that reason, and as more fully stated in the brief under the heading "Interest of *Amicus Curiae*," the members of the Clearing House have a vital and continuing interest in the outcome of this action.

The Clearing House therefore prays that the Court grant this motion for leave to file its brief.

Respectfully submitted,



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IN THE
Supreme Court of the United States
October Term, 1994

No. 94-1175

♦

BANK ONE, CHICAGO, N.A.,

Petitioner,

v.

MIDWEST BANK & TRUST COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Interest of *Amicus Curiae*

The New York Clearing House Association (the "Clearing House") is an association of eleven leading commercial banks in the City of New York.[1] Through its check clearing

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[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, NatWest Bank National Association, European American Bank and Republic National Bank of New York.

operations, the Clearing House clears daily an average of about 3 million checks, aggregating approximately $20 billion. The ability of the Clearing House and its member banks to process these checks efficiently and at the lowest cost to consumers depends in large part on uniform rules of law and accessible dispute resolution procedures.

The Clearing House regularly appears as *amicus curiae* in cases raising significant questions of law relating to banking. The decision of the Court of Appeals for the Seventh Circuit in this case raises such a question by threatening to create uncertainty and inconsistency in the resolution of check clearance disputes. The Clearing House banks believe that, if allowed to stand, the decision will unreasonably and unfairly affect the ability of the Clearing House banks and others to obtain uniform guidance and evenhanded justice in disputes arising out of the federal law governing the interbank check payment system.

Summary of Argument

The decision below erroneously deprives banks of access to the federal courts in civil disputes arising under and governed by federal law. Petitioner's claim against Respondent in this case arose under the Expedited Funds Availability Act ("EFAA"), 12 U.S.C. §§ 4001-4010, and the regulations promulgated thereunder. The district court thus presumptively had federal question jurisdiction of the case under 28 U.S.C. § 1331, unless EFAA displaced § 1331 with respect to interbank disputes. Nothing in EFAA or its legislative history suggests that Congress intended such an extraordinary displacement. To the contrary, the plain language of EFAA confirms the availability of the federal courts for resolution of disputes such as this one, arising under regulations adopted by the Board of Governors of the

Federal Reserve System (the "Board") pursuant to its statutory rulemaking authority.

The Court of Appeals' decision to close the doors of the federal courts to litigants seeking to resolve rights and liabilities arising under federal law and a federal regulatory scheme would also result in bifurcation of disputes arising from a single occurrence, creating judicial inefficiency, lack of uniformity, unnecessary procedural complexity and the potential for unfairly inconsistent adjudications. It is inconceivable that Congress intended to create such a result, particularly in legislation designed to create uniform standards of conduct.

ARGUMENT

The District Court Has Jurisdiction of This Case.

A. Background

Section 4010(f) of EFAA authorizes the Board to establish rules allocating loss and liability among depositary institutions for matters arising under the funds availability system implemented by EFAA. Pursuant to that authority, the Board has promulgated regulations governing interbank payment system liabilities, creating a uniform federal standard for the conduct of banks participating in the payment system and for determining their liability to each other and to their customers. 12 C.F.R. § 229.38. To the extent inconsistent with state law, these regulations are preemptive. 12 U.S.C. § 4007(b); 12 C.F.R. § 229.41.

The same statutory section that authorized the Board to adopt liability-creating regulations also provided that "any action under this section may be brought in any United States District Court, or any other court of competent jurisdiction . . . ." 12 U.S.C. § 4010(d). Applicability of this jurisdictional provision to interbank disputes has been

confirmed by the Board in its capacity as the agency principally charged with administering the statute. 12 C.F.R. 229.38(g). *See K-Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291-92 (1988) (unless agency interpretation conflicts with plain language of statute, court should defer to agency).

Petitioner's principal brief shows in detail how the plain language of § 4010(d) establishes federal court jurisdiction for the resolution of interbank disputes governed by regulations promulgated under § 4010(f). As set out hereafter, the general jurisprudence regarding federal question jurisdiction strongly reinforces Petitioner's position.

B. Petitioner's Claim Raised a Federal Question Presumptively Litigable in Federal Court.

In 28 U.S.C. § 1331 Congress provided that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." Section 1331 is the long established means by which an immense range of federally created and protected rights and obligations come to be litigated in the federal court system. It is a chief bulwark of support for the proposition that the federal courts should be open to litigants with federal claims or whose conduct will be judged under federal law and regulation. *See Powell* v. *McCormack*, 395 U.S. 486, 515 (1969) (purpose of § 1331 was to "provide a broad jurisdictional grant to the federal courts"). This action falls squarely within this purpose.

Petitioner claimed in the district court that Respondent was liable to it for having violated the standards of 12 C.F.R. § 229 promulgated by the Board under EFAA. As contemplated by Section 4010(d) of EFAA, these regulations, among other things, set uniform federal standards for allocating liability among banks in connection with disputes over funds availability. The lower courts have held, and commentators have concurred, that regulations such as these, promulgated

pursuant to Congressional authorization, are "laws" for purposes of § 1331. *See, e.g., Chasse* v. *Chassen*, 595 F.2d 59, 61 (1st Cir. 1979); *Murphy* v. *Colonial Federal Savings and Loan Ass'n*, 388 F.2d 609, 611 (2d Cir. 1967); *Farmer* v. *Philadelphia Electric Co.*, 329 F.2d 3, 7 (3d Cir. 1964); *see also* 13B Charles A. Wright *et al.*, *Federal Practice and Procedure* § 3563, at 51 (2d ed. 1984). *Cf. United States* v. *Mersky*, 361 U.S. 431, 437-38 (1960) ("Once promulgated, these regulations, called for by the statute itself, have the force of law . . . .").

Congress' intention to provide broadly for a federal judicial forum to resolve claims that arise under federal law was underscored in 1980, when Congress amended § 1331 to remove the jurisdictional requirement that the amount in controversy exceed $10,000. The accompanying House Report states that the amendment

> resolves the anomolous [sic] situation faced by persons who, although their Federal rights have been violated, are barred from a Federal forum solely because they have not suffered a sufficient economic injury. It represents sound principles of federalism by mandating that the *Federal courts should bear the responsibility of deciding all questions of Federal law.*

H.R. REP. NO. 1461, 96th Cong., 2d Sess. 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5063, 5063 (emphasis added). This Court has recognized that the federal courts are presumptively available for the vindication of federal rights:

> The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a

> reasonable foundation, the District Court has jurisdiction . . . .

Smith v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921).

The district court thus had jurisdiction of this case unless EFAA or its legislative history indicates a Congressional intent to displace § 1331 in cases involving interbank claims under EFAA regulations. *See Rosado* v. *Wyman*, 397 U.S. 397, 422 (1970). As shown hereafter, the statute does no such thing.

C. The Seventh Circuit's Decision Is Contrary to the Plain Language of EFAA.

Far from evidencing a congressional intent to limit federal jurisdiction, Subsection 4010(d) of EFAA expressly provides that the district courts shall have jurisdiction—concurrently with other courts of competent jurisdiction—of all actions brought under "this section." Although the Court of Appeals held that subsection (d) of 4010 applies only to claims brought under subsection (a), the "section" referred to in subsection (d) logically can only be section 4010 in its entirety, not just a single *sub*section to which no specific reference is made. Nothing in the legislative history of EFAA indicates that in enacting subsection 4010(d) Congress intended anything other than this plain meaning. There is thus no basis in the statute or its history to conclude that EFAA displaced the presumptive grant of federal court jurisdiction under § 1331.

Nor does the statute or its history support the notion that Congress mandated, *sub silentio*, a Board-created administrative tribunal to adjudicate private disputes between banks.[2] Nothing in EFAA authorizes the Board to establish an administrative process for resolution of private party claims, and in the absence of express authorization the Board has no authority to take such action. *See Coit Independence Joint Venture* v. *Federal S&L Ins. Corp.*, 489 U.S. 561, 573-74 (1989). Subsection 4009(c)(i) of EFAA, on which the Court of Appeals principally relied, applies only to regulatory enforcement, not private civil actions. Although the Court of Appeals argued that subsection 4010(f) "bolstered" its conclusion, that provision says nothing about administrative adjudication. Entitled "Authority to establish rules regarding losses and liability among depositary institutions," Section 4010(f) authorizes the Federal Reserve to establish the *rules* of interbank liability. The *forums* in which disputes are to be brought are separately specified in subsection 4010(d).[3]

A review of the regulations promulgated by the Board confirms that, notwithstanding its broad statutory mandate and responsibility for the nation's financial system and bank regulation, the Board has no administrative tribunals for

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[2] The Court of Appeals expressly held only that the district court did not have jurisdiction under § 4010(d), leaving open the implausible possibility of concurrent jurisdiction of state courts and a (nonexistent) federal administrative tribunal. The court's reasoning, however, makes clear that it considered that Congress had given the Board exclusive jurisdiction of interbank EFAA claims, at least at the federal level.

[3] Brushing aside the Board's statement that it had no mechanism for adjudicating interbank disputes, the Court of Appeals stated that "the Board's differing interpretation of the statute cannot confer jurisdiction upon the court." Pet. App. 25a. This conclusion misses the point that jurisdiction exists—under 28 U.S.C. § 1331—unless EFAA otherwise provides.

resolution of any private claims. It is highly improbable that Congress would have mandated an innovation of this magnitude without any explicit statement in the statute, without any indication of its intention in EFAA's legislative history, and without any record of consultation with the Board.

D. The Seventh Circuit's Decision May Cause Judicial Inefficiency and Unfairness by Requiring That Interdependent Claims Be Resolved in More Than One Forum.

Even apart from the importance of permitting the vindication of federal rights in federal courts, the Court of Appeals' denial of jurisdiction over interbank disputes creates the risk of judicial inefficiency and inconsistency that exists whenever related and interdependent suits are litigated in multiple forums. In many cases, a delay by a depositary bank in making funds available to a customer will give rise both to a claim against the bank by its customer, and by the bank against a second bank, most likely a paying bank as defined in 12 C.F.R. § 229.2(z). Liability of the depositary bank to its customer and of the paying bank to the depositary bank may well turn on the same factual questions: for example, whether the funds were made available on a timely basis (*see* 12 C.F.R. § 229.10(c)), whether the account is a "new account" thereby excusing compliance with certain provisions of the regulations (*see id.* § 229.13(a)), or whether noncompliance is excusable because the depositary bank acted with appropriate diligence in emergency conditions (*see id.* § 229.13(f)).

If separate proceedings are required to resolve all claims and cross-claims relating to a funds availability dispute, common fact questions might have to be litigated twice and with inconsistent results. This could lead to the injustice of a depositary bank being found liable to its customer, but being

unable to obtain indemnity or contribution from the responsible paying bank because of the anomaly that a different factfinder reached inconsistent conclusions about the same underlying facts.

It is precisely to avoid the inefficiency of multiple adjudications and the potential unfairness of inconsistent results that the Federal Rules of Civil Procedure have long permitted the adjudication of all claims arising from a common nucleus of facts in a single proceeding. *See, e.g.*, Fed. R. Civ. P. 14; *Colton* v. *Swain*, 527 F.2d 296, 299 (7th Cir. 1975); *Dery* v. *Wyer*, 265 F.2d 804, 808-09 (2d Cir. 1959). The Court of Appeals' decision effectively repeals Rule 14 for depositary banks sued under EFAA, requiring that they defend themselves against customer claims in one forum and then seek compensation under the same regulatory scheme in another forum with no assurance of consistent results. Moreover, the second forum—as envisioned by the Court of Appeals—will be either a nonexistent Board tribunal or a state court system incapable of assuring uniform application of this federal regulatory scheme.

Nor would a federal district court be permitted to remedy this uneconomic and potentially unjust result by assertion of supplemental jurisdiction over a depositary bank's third party claim. The grant of supplemental jurisdiction under 28 U.S.C. § 1367 is not applicable when "expressly provided otherwise by Federal statute." 28 U.S.C. § 1367(a). Under the Court of Appeals' interpretation of EFAA, Congress has "expressly provided" that the district courts shall not have jurisdiction over interbank claims asserted under EFAA. Thus, the same erroneous reasoning that would exclude federal question jurisdiction in the first instance would prevent invocation of 28 U.S.C. § 1367 to ameliorate the resultant inefficiency and hardship.

Conclusion

The judgment of the Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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